Supreme Court, U.S.
FILED

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Docket No.

IN THE SUPREME COURT OF THE UNITED STATES

KEENA WHITE, by her Personal Representative,Cindy White, CINDY WHITE, Individually, and Cindy White as Guardian ad Litem for DEIDRE JONES, CLIFFORD WHITE, JR., PATRIC WHITE, DANIEL WHITE, and DARREN WHITE,

Petitioners,

-- against --

RUBY CHAMBLIS; TINA WERTS; TANGA GILCHRIST; CLARENCE GRAHAM; CASSIE WILSON; MARIE DUNNAM; RAMONA FOLEY; BARRY DOWD; WILBERT LEWIS; JAMES C. SOLOMON, JR.; JOANNE SCHAEKEL; DESIREE COUNCIL,

Respondents,

-- and --

ANTHONY BONNER, GLADYS BONNER, and TONY BONNER,

Defendants.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED

I. IS ESTABLISHMENT OF A STATE CHILD PROTECTION PROGRAM WHICH INCLUDES THE ESTABLISHMENT OF FOSTER HOMES AND THE INVOLUNTARY REMOVAL OF CHILDREN FROM THEIR PARENTS SUFFICIENT STATE ACTION, STATE CUSTODY, CREATION OF A KNOWN DANGER AND/OR THE RENDERING OF A CHILD MORE VULNERABLE TO A DANGER, SUCH AS TO IMPOSE A CORRESPONDING CONSTITUTIONAL DUTY OF RESPONSIBILITY ON THE STATE FOR THE REASONABLE SAFETY AND WELL BEING OF A CHILD IN FOSTER CARE AS SET FORTH IN THE PRINCIPLES OF YOUNGBERG AND ESTELLE?

II. DOES 42 U.S.C. § 1320a-2 (1994) SUPERSEDE SUTER V. ARTIST SUCH THAT PROVISIONS OF THE ADOPTIONS ASSISTANCE AND CHILD WELFARE ACT OTHER THAN § 671(A)(15) CREATE PRIVATELY ENFORCEABLE RIGHTS?

III. DOES A CHILD INVOLUNTARILY PLACED IN FOSTER CARE HAVE FEDERALLY ENFORCEABLE PROCEDURAL DUE PROCESS RIGHTS, WHERE THE STATE CHILD PROTECTION STATUTE HAS GRANTED THE CHILD AN ENTITLEMENT TO RECEIVE PROTECTIVE SERVICES?

LIST OF PARTIES

Petitioners: Keena White (deceased), by her Personal Representative, Cindy White; Cindy White, Individually; Cindy White as Guardian Ad Litem for Deidre Jones, Clifford White, Jr., Patric White, Daniel White, Darren White.

Respondents: Ruby Chamblis; Tina Werts; Tanga Gilchrist; Clarence Graham; Cassie Wilson; Marie Dunnam; Ramona Foley; Barry Dowd; Wilbert Lewis; James C. Solomon, Jr.; Joanne Schaekel; Desiree Council.

Defendants: Anthony Bonner; Gladys Bonner; Tony Bonner

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OPINIONS BELOW

The decision of the United States Court of Appeals, Docket Numbers 95-3025, 95-3078, and 95-3088 is reported at _____ F.3d _____ and is set forth in full in the Appendix at 1a. The opinion of the District Court is unreported and is also set forth in full in the Appendix at 16a.

STATEMENT OF JURISDICTION

The court of appeals rendered its decision on April 30, 1997. Rehearing was denied on May 28, 1997, and the mandate issued and took effect on June 5, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The federal statutes involved in this case are 42 U.S.C § 1983; 42 U.S.C. § 1320a-2; and 42 U.S.C. § 671 et. seq., all of which are set forth in full in the Appendix at 22a - 28a. The United States Constitutional provision involved is the Fourteenth Amendment, which is set forth in full in the Appendix at 22a.

STATEMENT OF THE CASE

By this petition, this Court is asked to review a decision of the United States Court of Appeals for the Fourth Circuit which held that the state may involuntarily remove children from their parent's custody without any corresponding duty to place the child in a reasonably safe environment and without any corresponding duty to monitor the child's welfare while in state custody absent actual knowledge of prior abuse by the foster parents. The Court is further asked to review the Fourth Circuit's decision that the South Carolina Child Protection Statute does not create an entitlement in foster children to procedural due process, and lastly, to review the Fourth Circuit's position that the Adoptions and Assistance Child Welfare Act creates no enforceable rights in foster children.

Stated differently, this Court is being asked to decide if children are merely "property" without any basic human rights or whether the "historic liberty interest" in the parent-child relationship is still valued in today's

society. This Court has always jealously guarded the individual's freedom and basic human rights especially in the prison/detention context. This case asks the Court to declare that children are individuals entitled to the same basic human rights of reasonable safety and well being as adults.

A. BRIEF SUMMARY OF THE FACTS

The state of South Carolina removed Keena White (age ten months) and her siblings from Cindy White's custody by ex parte order. A South Carolina Court gave DSS custody of Keena with placement authority. South Carolina law requires DSS and only DSS to select, license, train and monitor foster parents. None of the White children's foster homes met licensing regulations nor did any of them have the required training or monitoring. Keena and her siblings were not properly monitored during custody. Prior DSS agency reviews had found foster homes were not properly licensed, trained or monitored and that foster children were not monitored, which had resulted in numerous deaths. Keena's foster parents, the Bonners, had physically abused other foster children by hitting, slapping, locking in closets, and cursing them. Tony Bonner, the Bonner's adult son, had previously hit foster children in the head with his knuckles. Keena died of multiple blows to her head believed to be caused by an adult's knuckles. After Keena's death, DSS revoked the Bonner's foster home license and found that they caused Keena's death by child abuse. The Bonners are listed on the central registry as child abusers. DSS denies knowledge of prior abuse by the Bonners before Keena's death.

This lawsuit was filed under 42 U.S.C. § 1983 alleging procedural and substantive due process violations as well as violations of the Adoptions Assistance and Child Welfare Act to the Plaintiffs while in DSS custody.

B. DETAILED FACTUAL SUMMARY

On November 21, 1991 Cindy White's 18 month old son, Daniel sustained a spiral fracture to his arm when his arm got caught in the slats of his German slat bed. Because of the mandatory reporting laws, the hospital was required to call DSS and inform them of Daniel's injury. Defendant Gilchrist was assigned to investigate.

On November 22, the DSS Defendants contacted the Aiken County Sheriff's Department and requested that a deputy remove the White children

from their mother. The Sheriff's department sent a deputy to the White home. However, after examining the condition of the children, and establishing that there was adequate food and milk and that the children were in no apparent danger, the deputy refused to remove the children.

Defendants Gilchrist and her supervisor Defendant Chambliss then filed an ex-parte petition with the family court based solely on the possible abuse to Daniel based on the existence of a spiral fracture. There was no mention in the court petition of the White family's living conditions or possible neglect of the other White children nor that the Sheriff's deputy refused to remove the children. The petition was submitted to the family court and was granted by the judge on November 26, 1991, five days after the alleged abuse to Daniel occurred.

The children were removed by ex parte order on December 3, 1991, thirteen days after Daniel's injury. The removal was affirmed by the Court at a temporary hearing on December 4, 1991 and DSS was given temporary custody of the White children. Defendants answers admit that the children were in DSS custody from December 3, 1991 until Keena's death six weeks later on January 18, 1992.

By state statute, only DSS is authorized to license, train and monitor foster homes. The names and all information on foster parents is confidential, unavailable to the natural parents and the public. By statute, only DSS is authorized to place foster children in a foster home.

Once the Defendants removed the White children from their mother, they were placed in separate state-licensed foster homes and emergency shelters. None of the foster homes met the licensing requirements nor had the DSS Defendants correctly trained or supervised the foster homes. During the time the White children were in custody, the Defendants failed to adequately supervise their placements and failed to make required visits to the foster homes to check on their safety. The Defendants literally abandoned six (6) helpless children in the hands of untrained, unsupervised and abusive foster parents.

Keena White, ten (10) months old, was placed in the Bonner foster home where she received bruises on her forehead and beside her eye, as well as bite marks on her arms. She had a respiratory illness that was left untreated for two (2) or more weeks. The Bonners already had too many children in their home (eight) and were in violation of the licensing

requirements. The Bonners had not had the original nor yearly required training, Mr. Bonner drank excessive amounts of alcohol. Mr. Bonner and his adult son, who was living in the home with the knowledge and consent of DSS, would fight in the house, breaking furniture and throwing bottles at each other. Mr. Bonner would also threaten and hit Mrs. Bonner in front of the foster children. The Bonners would beat the children with sticks, belts and shoes for things such as wetting the bed. They would also lock the younger foster children in closets in the dark as punishment. The son particularly enjoyed hitting the children in the head with his fist as he walked by them. Tony Bonner had hit a foster child in the head with a brick, requiring stitches at the emergency room. At least two of the foster children carry scars inflicted on them by the Bonners to this day.

Keena White was murdered on January 18, 1992 in the Bonner foster home while still in the legal custody and care of the DSS Defendants. The Department of Social Services investigated Keena's death and determined that the Bonners abused Keena White, the other foster children placed in their home by DSS, and the Bonner's own grandchildren who were also living with them. The Bonners were placed on the Central Registry of child abusers and were determined by the Department of Social Services to have caused the death of Keena White by child abuse. Their foster home license was revoked by DSS

The other five White children were also abused and/or neglected while in DSS's custody. Three of the children required Emergency Room treatment: one for a urinary tract infection, one for bronchitis, and one for pneumonia. All of the children received some physical injury - bruises, cuts, belt marks.

The Defendants were made aware of the condition of the White children during their stay in foster care. Cindy White reported suspected abuse and/or neglect of her children to Defendants Graham, Werts, Gilchrist and Wilson in person while visiting her children on December 6, December 9, and December 23. Senator Strom Thurmond wrote Defendant Dunnam a letter reporting Cindy's observations of suspected neglect and/or abuse on December 20. Defendants Dunnam, Wilson, Graham, Chambliss and Gilchrist saw the letter. When Cindy could not get any help from these Defendants, she wrote a letter to the State DSS Office expressing her concern for the safety of her children and the abuse and/or neglect occurring in their foster care placements. Defendants Solomon, Dowd, Lewis, Foley, Schaekel and Council either saw or knew of this letter. Carol Heyes of the

Aiken County Delegation Office, at the request of State Senator Thomas Moore, spoke with Defendants Graham and Wilson regarding the abuse and/or neglect suffered by the White children while in foster care. Defendants did not investigate any of these reports and did not take any steps to ensure the White children's safety while in state custody.

By the January 24, 1992 hearing, there were only five children to consider because Keena had been murdered on January 18, 1992, while in DSS custody. Consequently, the Defendants offered to return all of Cindy's children to her if she would agree that "someone" abused Daniel and agree to various other requirements such as parenting classes and a psychological evaluation. With one of her children already murdered while in DSS' custody, Cindy was willing to sign any agreement that would get the rest of her children out of the clutches of DSS. Cindy's five remaining children were then returned to her without any changes having occurred in her parenting abilities prior to their return.

Cindy White then filed this law suit on November 18, 1993 on behalf of herself and her children, both living and deceased, alleging that the Defendants violated the White family's constitutional and federal statutory rights. After two years of discovery, which revealed many government studies of the Department of Social Services which detailed long-standing significant deficiencies in the areas of foster home licensing, foster care services, child protective services, and supervision, both Plaintiffs and Defendants filed Motions for Summary Judgment, all of which were denied by the District Court. Defendants Solomon, Lewis, Dowd (Webster), Foley, Council, Schaekel, Dunnam, Wilson, Chambliss, Graham, Werts, and Chambliss then filed notices of appeal as to the issue of Qualified Immunity on December 18, 1995. The Fourth Circuit heard oral arguments on March 6, 1997 and granted Defendant's appeal, dismissing the case on the grounds of Qualified Immunity. Petitioner then filed a petition for re-hearing *en banc* on May 14, 1997 which was subsequently denied.

ARGUMENTS

I. THE ESTABLISHMENT OF A STATE CHILD PROTECTION PROGRAM WHICH INCLUDES THE ESTABLISHMENT OF FOSTER HOMES AND THE INVOLUNTARY REMOVAL OF CHILDREN FROM THEIR PARENTS IS SUFFICIENT STATE ACTION, STATE CUSTODY, CREATION OF A KNOWN DANGER AND/OR THE RENDERING OF A CHILD MORE VULNERABLE TO A DANGER SUCH AS TO IMPOSE A CORRESPONDING CONSTITUTIONAL DUTY OF RESPONSIBILITY ON THE STATE FOR THE REASONABLE SAFETY AND WELL BEING OF A CHILD IN FOSTER CARE

A. The Fourth Circuit is in direct conflict with several other Circuit Courts and the Supreme Court

The Fourth Circuit has now held that foster children are entitled to no affirmative constitutional duty of protection while in state custody whether or not they were involuntarily placed in foster care. In this case, the foster child was seized and ordered into foster care by a state court and no duty to protect was found. In Milburn v. Ann Arundel County Department of Social Services, 871 F.2d 474 (4th Cir. 1989), the foster child was voluntarily surrendered by his parents, and no duty to protect was found. In the Fourth Circuit, a foster child is vulnerable and unprotected under any set of facts. However, several Appellate Courts have held, pursuant to Estelle v. Gamble, 429 U.S. 97 (1976), and Youngberg v. Romeo, 457 U.S. 307 (1982), that a State may be held liable under both the substantive and procedural provisions of the Due Process Clause of the Fourteenth Amendment for failing to protect children in foster homes from mistreatment at the hands of their foster parents. Because several circuits disagree on a fundamental federal constitutional right, and the degree to which that right will be enforced varies purely as a function of geographical location, certiorari should be granted.

The Eleventh Circuit in Taylor ex rel. Walker v. Ledbetter, 818 F.2d 791 (11th Cir. 1987), cert. denied, 489 U.S. 1065 (1989), held that the state's action in assuming responsibility of finding and keeping a child in a safe environment by removing a child from the custody of her natural parents placed an obligation on the state to ensure continuing safety of the

environment and any failure to do so constituted a deprivation of that child's Constitutional rights:

> In this case, the child's physical safety was a primary objective in placing the child in the foster home. The state's action in assuming the responsibility of finding and keeping the child in a safe environment placed an obligation on the state to insure the continuing safety of that environment. The state's failure to meet the obligation, as evidenced by the child's injuries, in the absence of overriding societal interests, constituted a deprivation of liberty under the fourteenth amendment.

818 F.2d at 795. In Taylor, Kathy Jo Taylor was removed by court order from her natural parents in 1982 and was placed in the custody of the Gwinnett County Department of Family and Children Services. The Department then placed Kathy Jo in a foster home where she suffered severe and permanent personal injuries as a result of being willfully struck, shaken, thrown down, beaten and otherwise severely abused by the foster mother.

Using Estelle and Youngberg as the basis of their analysis, the Eleventh Circuit found that the child had a substantive due process right under the Fourteenth Amendment to the Constitution to be free from the infliction of unnecessary pain and a fundamental right to physical safety. In Youngberg, the mother of a mentally retarded person involuntarily committed to a Pennsylvania state institution filed a complaint pursuant to §1983 alleging that the institution's officials knew or should have known that her son was suffering injuries. The Supreme Court recognized the child's liberty interest in the safety of his environment and noted that the right to personal security constitutes a historic liberty interest protected substantively by the due process clause. 457 U.S. 307. The Eleventh Circuit reasoned that a foster child's situation is analogous to Youngberg's in that in both cases the state involuntarily placed the person in a custodial environment and in both cases the person was unable to seek alternative living arrangements. 818 F.2d 791.

In Estelle, the Supreme Court held that prison officials who show deliberate indifference to a prisoner's serious illness or injury violated the eighth amendment's prohibition against the infliction of cruel and unusual punishment. Such a transgression gives rise to a prisoner's action under §1983. The Eleventh Circuit reasoned that a foster child involuntarily

placed in a foster home is in a situation so similar to that of a prisoner involuntarily placed in an institution that similar rules of law should be applied. The Eleventh Circuit stated, "Although the contacts between actors in the foster home situation are not as close as in the penal institution, the situations are close enough to be held analogous." Taylor, 818 F.2d at 796. The Eleventh Circuit concluded:

> In the foster home setting, recent events lead us to believe that the risk of harm to children is high. We believe the risk of harm is great enough to bring foster children under the umbrella of protection afforded by the fourteenth amendment. Children in foster homes, unlike children in public schools, are isolated; no persons outside the home setting are present to witness and report mistreatment. The children are helpless. Without the investigation, supervision, and constant contact required by statute, a child placed in a foster home is at the mercy of the foster parents."

818 F.2d at 797.

The Sixth Circuit has also held that foster children have a constitutional right to protection while in state custody. In Meador v. Cabinet for Human Resources, 902 F.2d 474 (6th Cir. 1990), the Court reasoned:

> Indeed, several Courts of Appeals have held ... that the State may be liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents. 109 S. Ct. at 1006 n. 9. Thus DeShaney clearly does not apply to the instant case .... We hold that due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes.

Id. at 476. In Meador, three children were placed in the custody of the Kentucky Cabinet for Human Resources. The Cabinet then placed the three children in the Douglass Foster Home where they were sexually abused. The children then filed suit against the Cabinet under § 1983, alleging that the Cabinet violated their Constitutional rights by placing the children in a foster home where a previous foster child had been sexually abused. Relying on the analysis set forth in Taylor and Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981), cert. denied, 464 U.S. 864 (1983), the Sixth Circuit held that : "due process extends the

right to be free from the infliction of unnecessary harm to children in state-regulated foster homes." Meador, 902 F.2d at 476.

The Second Circuit in Doe held that where a state official's deliberate indifference is a substantial factor in denying property or liberty interests, a child in foster care is in a situation analogous to a prisoner in state custody. Consequently state officials responsible for foster placement may be liable under section 1983. 649 F.2d at 141. In Doe, a foster child sued her legal custodian and a voluntary child welfare agency which provided foster care under a contract with the City of New York. The foster child alleged that state officials violated her constitutional rights when, with the knowledge of possible sexual abuse from her foster father, they failed to investigate or remove her from the foster home. Again relying on Youngberg and Estelle, the Second Circuit held:

> When individuals are placed in custody or under the care of the government, their governmental custodians are sometimes charged with affirmative duties, the nonfeasance of which may violate the Constitution. Thus nonperformance of such custodial duties has been held to give rise to a section 1983 case of action for prisoners."

649 F.2d at 140. See also; Norfleet ex rel. Norfleet v. Arkansas Dep't of Human Servs., 989 F.2d 289, 291-93 (8th Cir. 1993); Yvonne L. ex rel. Lewis v. New Mexico Dep't of Human Servs. 959 F.2d 883, 892-93 (10th Cir. 1992); K.H. through Murphy v. Morgan, 914 F.2d 846, 849-50 (7th Cir. 1990).

The Fourth Circuit opinion also conflicts with applicable decisions of this Court. Although the Fourth Circuit does not discuss specific cases or refer to U.S. Supreme Court precedent, the conflict is clearly apparent based on its decisions. The Fourth Circuit ruled that foster parents are private actors whose deeds are not attributable to DSS yet the decision failed to distinguish West v. Atkins, 487 U.S. 42 (1988), where a private physician was determined to act under color of law and his actions were attributable to the state. Further the Fourth Circuit has held that there is no duty of safe keeping and protection of the welfare of a child involuntarily in state custody. This Court has consistently held that when the state creates a dangerous situation, and/or when the state makes a person more vulnerable to a danger, and/or when the state infringes on an individual's liberty, the state assumes a corresponding duty of protection for the

person's well being and reasonable safety. Youngberg, Estelle, DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 109 S. Ct. 998 (1989). In the instant case, the state created a dangerous situation by its repeated failure to properly select, investigate, license, train, and monitor foster homes. Moreover, it rendered Keena White more vulnerable by its failure to properly visit and monitor her while she was in foster care. Obviously, the State infringed on Keena's liberty by removing her from her mother and requiring that she live with the Bonner foster parents. However, the Fourth Circuit found no liability.

In direct opposition to the Second, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, the Fourth Circuit has now held that the state owes no duty of protection to a child placed in foster care because foster parents are private actors and harm inflicted by foster parents must be considered private violence. The Fourth Circuit has also held that deliberate indifference and/or lack or professional judgment are not factors in the selection, licensing, training, and monitoring of foster parents absent suspicion or knowledge of prior abuse. The Fourth Circuit has held that DSS is not required to take any responsibility whatsoever to determine the suitability of a child's placement. In fact, ignorance is bliss in the Fourth Circuit. The Fourth Circuit, like most others, has always recognized Youngberg in 1982, and Estelle in 1986 as creating a right to reasonable safety in any type of state custody. Likewise, DeShaney, recognized foster care as custody, but did not address the issue because those facts were not before the Court. However, this Court still noted that the creation of a danger or the rendering of an individual more vulnerable would impose liability. The Fourth Circuit's reasoning is in direct conflict with this Court's decisions in Youngberg, Estelle, and Deshaney, as well as the above-discussed circuit court decisions.

B. The Fourth Circuit's Opinion is patently wrong

1. Foster Children are in the Custody of the State, and Foster Parents Act Under Color of State Law.

The very act of foster parents retaining physical control of a foster child is possible only because they are clothed in the power of the state. The foster home license is a badge of state authority that permits one to restrict, control, and detain the child of another. The relationship between the foster parent and the foster child has its "origins in an arrangement in which the

State has been a partner from the outset." Smith v. Organization of Foster Families, 431 U.S. 816, 846 (1977). Foster care is a creature purely of statute, existing only at the behest of the state, and only for the purpose of conducting state business. See Smith, 431 U.S. at 856 (Stewart, J., concurring in judgment); See also 27 S.C. Code Ann. Regs. 114-550 (1992).

In Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), the Court found state action where a private restaurant refused service to Negroes, merely because the restaurant leased its facilities from the state. Here, the foster home accepts public funds from the state which are intended to benefit the foster child, who remains a ward of the state while in foster care.

In West, on certiorari to the Fourth Circuit, the Court found state action where a private physician treated state inmates under contract. 487 U.S. at 54. Key to that holding was the fact that the injured inmate could not turn anywhere but to the state for his care and treatment, 487 U.S. at 55, just as foster child Keena White could turn to no one else but her state appointed foster parents. Furthermore, Keena's natural mother could turn to no one but the state with her complaints that Keena was in need of care and treatment, and her complaints that Keena was at risk of abuse and neglect in foster care. She was not free to remove her child from the foster home and transport her to a physician or to a qualified care giver. The White's had no choice but to deal with the state; and it was a Hobson's choice at best, because it was no choice at all.

To say that no state action lies in a court-ordered foster care placement is a logical fallacy. The state enacted the South Carolina Child Protection statute which allowed DSS to petition the court to remove Keena from her home and also empowered DSS to license, train and monitor foster parents. Keena White was ordered into foster care by a South Carolina Family Court, and could only be released from foster care by a South Carolina Family Court. The state is as much present in Keena White's case as were the state courts that enforced discriminatory private covenants in Shelly v. Kraemer, 334 U.S. 1 (1948). Keena White's placement in the hands of foster parents was possible only because it was judicially enforced. The state was present and was responsible for her safety from the moment the sheriff's deputy carried her out of her home until the moment she drew her last breath.

This case is not a licensing case like Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), where the mere granting of a state license standing alone does not give rise to state action. Where foster care is concerned, the state does much more than simply grant a license. The state in effect certifies a private home as a treatment or holding facility, and the home deals exclusively with the state and discharges some of the responsibilities that the state assumes by seizing a child. The state selects, trains, monitors, and supervises the foster parents and the foster homes in order that the state's child protection laws are carried out. The State bore an affirmative obligation to provide adequate care to Keena White. The State delegated that function to her foster parents, and the foster parents, in exchange for a public benefit, voluntarily assumed that obligation. The fact that foster parents are not full-time, permanent state employees does not render them purely private actors. Foster parents are fully vested and in effect deputized with state authority to fulfill essential aspects of the duty, placed on the State by the Eighth Amendment and state law, to provide essential care to children the State has seized and taken into custody. Foster parents must be considered state actors. See West, 487 U.S. at 57. In this case, however, the White family could not freely terminate the state-compelled foster care arrangement, and the foster parents drew monthly board payments from the state. Likewise, the Record alleges the statutory and regulatory interdependence between South Carolina foster homes and the state which mandates the selection, training, and monitoring procedures which must be undertaken, as well as the detailed description of duties set forth in the foster parent contract.

The differences between the instant case and Milburn are far from small, as several circuits have recognized. Milburn simply does not provide a convenient one-size-fits-all answer to the question of whether foster parents are state actors or act under color of law. See e.g. Taylor ex rel. Walker v. Ledbetter, 818 F.2d 791 (11th Cir. 1987); Meador v. Cabinet for Human Resources, 902 F.2d 474 (6th Cir. 1990); L.J. ex rel. Darr v. Massinga, 833 F.2d 118 (4th Cir. 1988); Doe v. New York City Dept. of Soc. Serv., 649 F.2d 134, 141-142 (2d Cir. 1981), on remand, 709 F.2d 782, cert. denied sub nom. Catholic Home Bureau v. Doe, 464 U.S. 864 (1983). Milburn was decided immediately after DeShaney v. Winnebago County DSS, 489 U.S. 189 (1989) and used the reasoning set forth in DeShaney to decide the case rather than applying the case law set forth in cases such as Youngberg and Estelle which govern situations where the state has assumed custody of an individual. Milburn clearly states that DeShaney is controlling and the essential facts are indistinguishable.

In DeShaney, the Court found no duty to protect against private violence even if the state knew of danger to a specific individual. DeShaney emphasized that "the affirmative duty to protect arises not from the state's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitations which it has imposed on his freedom to act on his own behalf, through imprisonment, institutionalization, or other similar restraint of personal liberty." 109 S. Ct. at 1006. Joshua DeShaney was in the custody of his father, not the state. Likewise, Milburn stated that "the State of Maryland, by the affirmative exercise of its power, had not restrained the plaintiff's liberty; he was voluntarily placed in the foster home by his natural parents." 871 F.2d at 476. Unlike Maryland, South Carolina did restrain Keena's liberty and Cindy White's right to her child's custody, the most fundamental personal liberties of both Keena and Cindy White. This is precisely the restraint of freedom that the DeShaney Court said triggers the corresponding affirmative duty to provide adequate protection. DeShaney, 109 S. Ct. at 1006 (citing Estelle v. Gamble, 429 U.S. 97 (1976); Youngberg v. Romeo, 457 U.S. 307 (1982)).

The Fourth Circuit has now held that nothing in Milburn limited its application to voluntary placement (Op. at 12). However, the facts and the ratio decidendi of Milburn are inextricably grounded on a voluntary placement that lacked the affirmative exercise of state power against the individual. The Whites' ability to provide for their own needs was stripped away without any safety or protection provided by the state. The White ex parte Order States: "IT IS THEREFORE ORDERED that emergency protective custody, and the temporary care and control of the minor children Daniel, Darren, Deidre, Clifton, Patric, Keena, be awarded to Aiken County Department of Social Services and that the Department shall exercise temporary custody, placement, planning and supervision of said children." The temporary order of December 4, 1991 holds: "That custody of the minor children shall be with DSS pending the merit's hearing . . . .". All Defendants also admitted in their Answers that the White children were in the legal custody of DSS and its agents from December 3, 1991 until Keena's death on January 18, 1992.

The state's affirmative exercise of its power, by taking the White children into custody, created an affirmative duty of protection, and required the provision of reasonable safety, food, and shelter, all of which the State delegated to the Bonners. Youngberg; Estelle. As the Supreme Court explained in West v. Atkins, 497 U.S. 42 (1988), this is the nexus that creates state action which will sustain an action under § 1983. In

Andrews v. Federal Home Loan Bank of Atlanta, 998 F.2d 214, 218 (4th Cir. 1993), the Fourth Circuit described four instances where private parties can be state actors subject to § 1983. The second situation applies in the White case: "(2) When the state has sought to evade a clear constitutional duty through delegation to a private actor." Andrews, 998 F.2d at 217. The Fourth Circuit discussed West and stated: "Government cannot evade constitutional duties by delegating the responsibility to a private contractor." 998 F.2d at 218. See also Mitchell v. Aluisi, 872 F.2d 577 (4th Cir. 1989). The Fourth Circuit's decision in White neither distinguishes nor considers West, nor the conflicting Fourth Circuit opinions, nor addresses the critical fact that the White children were involuntarily seized and removed from the custody and care of Cindy White by a direct and forcible exercise of State power and authority. Even Defendants admit that Keena was in state custody.

No State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961). While the state may delegate its authority, it may not delegate its accountability, yet that is what the Fourth Circuit has held to be constitutionally permissible. Government, be it federal, state, or local, exists for essentially two reasons: to perform necessary social functions which cannot be done efficiently by the private sector, and to perform necessary social functions which cannot be left to private actors due to a high risk that the public interest will not be served. Foster care falls into the latter category. It is state regulated for the sole purpose of protecting children from both abusive parents and abusive foster parents. When a baby like Keena White dies from multiple blows to the head in an overcrowded, unfit, unsupervised foster home, the state that placed her there must be held to answer.

White is not a "promise" case like Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), which the Supreme Court has denounced, but is a true "custody" case invoking constitutional protection because of the state restraint of the Petitioners' liberty. In fact, the liberty and freedom restrained in White, under the reasoning of Youngberg, would exceed those of prisoners who had violated the law and mental patients who had been committed to state institutions, although due to no fault of their own. In White, there was no merits hearing or opportunity to determine if the restraint was justified, and even if justified, Keena had committed no crime nor behaved improperly.

2. The State's Custodial Relationship with the Foster Child Imposes an Affirmative Duty of Reasonable Protection in a Child's Placement as Well as While the Child Is in Foster Care.

By taking Keena White into legal and physical custody, the state assumed and incurred an affirmative duty of protection that required the provision of reasonable safety, food, and shelter, all of which the State delegated to the foster parents. The right to personal security constitutes a "historic liberty interest" protected substantively by the Due Process Clause of the Fourteenth Amendment, and that right is not extinguished by lawful confinement, even for penal purposes. If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it follows a fortiori that it is unconstitutional to confine the involuntarily committed -- who may not be punished at all -- in unsafe conditions. Youngberg, 457 U.S. at 315-316 citing Ingraham v. Wright, 430 U.S. 651, 673 (1977); Hutto v. Finney, 437 U.S. 678 (1978). When the State, by the affirmative exercise of its power, so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs -- e.g., food, clothing, shelter, medical care, and reasonable safety -- it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. Deshaney, 489 U.S. at 199, citing Estelle, 429 U.S. at 103-104; Youngberg, 457 U.S. at 315-316.

Thus, by taking custody of Keena White, the State bore a constitutional duty to reasonably protect her against harm inflicted by its agents and against any other dangers it might create or expose her to. This is not to say that a foster child, or any other person in state custody is entitled to absolute safety, or that the state is strictly liable for any harm the person might suffer. An inadvertent failure to provide adequate care could not be said to constitute an unnecessary and wanton infliction of pain or to be repugnant to the conscience of mankind. Estelle, 429 U.S. at 106. However, liability should be imposed when decisions by those charged with the care and control of one in custody are such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment. Youngberg, 457 U.S. at 323. See also 457 U.S. at 312 n.11 (explaining that the deliberate indifference standard adopted in Estelle v. Gamble was erroneously used outside the penal context). In this case, there are national standards recognized by DSS Defendants, such as the Child

Welfare League standards, which are almost identical to the South Carolina Child Protection Statutes, DSS policy and procedure, and the licensing requirements.

In this case, the Fourth Circuit erroneously applied a heightened and improper standard of proof to the facts. The proper standard for liability in this case is not whether the Defendants were deliberately indifferent to the rights of the Plaintiffs, but whether they failed to exercise reasonable professional judgment in the discharge of their duties and deviated substantially from national standards. However, the Record supports liability in this case under either standard, and qualified immunity is therefore improper.

By seizing Keena White, isolating her from her family, and forcing her into a dangerous and unsupervised foster home, the state so far departed from any professional standard of judgment that her violent death, although shocking, is unsurprising. The foster parents had no foster parent training, had too many children in the home, had previously abused foster children by striking them on their heads with bare knuckles (the cause of Keena's death), hitting at least one child with a brick and causing a gash requiring stitches, locking children in closets, and hitting them with shoes. The foster parents drank excessively, routinely used profanity in front of children, and fought physically, at times knocking holes in the walls of their home. The state failed to discover these facts before placing Keena White in the house because it rarely visited the home or the other foster children, did not obtain foster child medical records (which was required by statute and would have revealed that a child was hit with a brick), and did not adequately investigate the foster parents prior to licensing them. Only the state has the authority, duty, and responsibility to license foster homes. The names of foster parents are confidential; no one else can check behind DSS. Only the state had the authority to place Keena in her foster home.

In White, the Defendants created the dangerous situation in which they placed Keena by their inadequate licensing and supervision of the home, duties for which they were directly responsible. Under the present system, the State does nothing more than tell potential foster parents: "Fill out a form and we'll give you some children." The state fails to properly investigate the backgrounds and qualifications of foster parents, fails to train them, and fails to supervise them by making the required visits to foster homes. So many children have died in Aiken County foster homes that the county DSS director was fired, caseworkers were criminally

charged, and the agency was investigated by state DSS and law enforcement. These Defendants conducted the investigations and prepared the reports that found numerous caseworkers admitted to willful violations of procedures and law, that all foster child deaths in Aiken County could have been prevented, and that the agency was in a legally indefensible position. Defendant Dunnam was hired to replace the fired director.

The Defendants had a duty and responsibility to reform South Carolina's dangerous foster care system. The White decision states that none of the Defendants knew or suspected that the Bonners were abusive. (Op. at 10). DSS cannot bury its head in the sand by failing to properly license, train, inspect, and supervise foster parents, and claim innocence when the obvious danger it creates causes injury time after time.

Closely related to the DSS failure to properly select, license, train and monitor foster parents, is DSS's responsibility to monitor Keena's safety and well being after she is placed in foster care. The Fourth Circuit again said there was no duty of safety or well being from the private violence of foster parents. State statute as well as national standards require regular visits to the child and foster home. Not only did DSS fail to make the required visits, DSS had not visited the other foster children in the Bonner home, nor monitored their medical records. Further DSS never started even one investigation of abuse to Keena in foster care although Cindy White, her mother, reported repeated injuries including bruises, several bite marks, a cut under eyes, a knot on her forehead, and respiratory congestion. The Fourth Circuit at oral argument dismissed these as normal childhood injuries although Keena was only ten months old. Her mother felt strongly enough about her children's safety to contact the Aiken County Delegation, Senator Storm Thurmond and State DSS when Aiken County DSS refused to help her. She did all of this within four weeks because she realized the seriousness of the danger. State law as well as national standards set forth a procedure for investigating reports of abuse. These investigations are handled by a different part of DSS from the child's foster care worker, a person trained in child abuse investigation; there are forms to be completed which help asses the risk to the child. These procedures were never even started. The caseworkers did not have the right and could not make a decision on Cindy White's, Senator Thurmond's, and the Delegation's reports of abuse. Keena was too young to seek help from a neighbor or a school teacher. Without DSS's visiting and monitoring and investigating when others believed she was in danger, Keena was helpless in a system created and controlled by DSS. Likewise, Cindy White was

helpless. She cried out for help from every source as she watched and waited for her baby to die. The Fourth Circuit says this is acceptable; the state (DSS) had no duty to act because the foster parents were private actors. If Nicholas Romeo had new injuries on him, or a prisoner continuously had injuries, this Court would not allow such conduct to continue. Estelle, 429 U.S. 97; Youngberg, 457 U.S. 307.

The Defendants exercised State power and restraint over Keena, placed her in the clutches of the Bonners, and failed to protect her. They tossed her to the lions and turned their backs as she was devoured.

3. The Fourth Circuit Erroneously Applied a Higher Standard of Liability to this Case.

The Fourth Circuit also did not apply the correct standard of review because such action is inconsistent with it's holdings in Winfield v. Bass, 106 F.3d 525 (4th Cir. 1997); Buonocore v. Harris, 65 F.3d 347 (4th Cir. 1995); Finelli v. Tabb, 67 F.3d 67 (4th Cir. 1995); and the U.S. Supreme Court's holding in Johnson v. Jones, 115 S. Ct. 2151 (1995). On an interlocutory appeal from a denial of qualified immunity the only issue that may be determined is whether the official's conduct violated clearly established law. Winfield, 106 F.3d at 529. The Fourth Circuit stated that the White's claim to a constitutional right to safe placement falls short on the facts (Op. at 10), because the Fourth Circuit required either actual knowledge or suspicion of prior abuse by foster parents, followed by a deliberate failure to act. This, however, is neither the prevailing nor the appropriate standard. Taylor and Doe both recognize a § 1983 cause of action for failure to act when the duty to act exists, Taylor, 818 F.2d at 796, and both cases held that agencies and individual defendants who deliberately fail to learn what is going on in foster homes can be liable. Taylor, 818 F.2d at 796-97; Doe, 649 F.2d at 145. Both also found top supervisors to be deliberately indifferent to a known injury, a known risk, or a specific duty and that their failures to act proximately caused the plaintiffs' injuries. Doe specifically acknowledged the DSS employees' statutory duty to protect children. Id.

Doe further explains that repeated acts of negligence can be evidence of indifference, 649 F.2d at 142, and that DSS employees can be charged with knowledge of unconstitutional conditions when they persistently violate their statutory duty to inquire about such conditions and to be responsible for them. 649 F.2d at 145. The more specific the statute

or regulation, the stronger the inference of deliberate indifference in its violation. 649 F.2d at 146. The White Plaintiffs have alleged and factually supported numerous licensing, training, and supervision violations regarding the Bonners, as well as chronic licensing, training, and supervising violation of foster homes throughout Aiken County. The Plaintiffs have offered reports prepared for and by Defendants Solomon, Dowd, Foley, Lewis, Schaekel, Council, and Dunnam that describe a systematic pathology of deplorable regulatory failures within ACDSS foster care. In their respective depositions, the Defendants barely admit reading the reports, but certainly offer no testimony of corrections. The agency itself found that background checks of foster parents were inadequate, that training was not conducted, and that home visits were not made. These self-assessing reports found these chronic abuses to be so pervasive and routine as to be considered criminal and legally indefensible, and that the violations of state law, policy, and procedure had caused the injury and death of Aiken County foster children for several years prior to Keena White's death. In fact, the last such foster child died the same month the White children were seized, with problems noted on November 8, 1991 at the agency, but nothing was done to correct those problems prior to Keena's death on January 18, 1992. The Record reveals that the Defendants failed to fulfill virtually every duty they owed to Keena[1]; Defendant Solomon was in fact "directed to take all appropriate and necessary action to ensure that the Aiken County Department of Social Services is immediately in full compliance with [all laws and regulations]." Yet he continued to rubber-stamp foster homes licenses without verifying or checking any of the applications. Instead of making any independent verifications Solomon relied on his subordinates despite the fact he had no knowledge of

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[1] The manifest failures in the various Defendants' obligations to the Whites can be located in detail as follows: Graham -- J.A. 362-68, 382-402 with exhibits through 580, 1388-92, 1415-17; Chamblis -- J.A. 589-95, 605-19 with exhibits through 720A; Werts -- J.A. 418-20, 735-38, 741-55, 1414-15; Gilchrist -- J.A. 764-73, 777-92 with exhibits through 824, 1412-14; Wilson -- J.A. 1138-42, 1151-70 with exhibits through 1186; Dunnam -- J.A. 1096-1097, 1204-24 with exhibits through 1258, 1417; Foley -- J.A. 843-45, 883-95, 916-1097; Dowd -- J.A. 841-42, 871-72, 874, 881-82, 884-95, 916-1097; Lewis -- J.A. 843, 874, 883-95, 916-1097; Solomon -- J.A. 838-40, 327-28, 874-81, 884-95, 916-1097; Schaekel -- 841, 874, 883-95, 916-1097; Council -- 842-43, 874, 883-95, 916-1097.

procedures used and did not monitor employees of Aiken County DSS. Moreover, Dunnam admitted in her deposition to having seen the reviews detailing problems at the ACDSS and merely stated two years later that "there's not going to be overnight stability," and while she was aware of problems with ACDSS, she made no effort to fix the problems in the foster home system that were contributing to the death of children. Defendant Foley stated in her deposition that it was her responsibility to make sure counties were implementing policies and procedures that complied with the law. It was clear from the numerous reviews that ACDSS was not in compliance. Thus, even if the heightened standard of deliberate indifference controls this case, the Record supports it and the Defendants should be taken to trial.

Moreover, the Petitioners raise material issues of fact as to the Defendants' knowledge of the serious risk of harm in unsupervised, improperly licensed foster homes. The determination of this "is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence . . . ." Farmer v. Brennan, 511 U.S. 825, 842 (1994); Brice v. Virginia Beach Correctional Ctr., 58 F.3d 101 (4th Cir. 1995). It need not be shown that the Bonners posed a risk to Keena individually. Farmer, 511 U.S. at 843. DSS knew that its policy of not supervising, not investigating, and improperly licensing foster homes had already caused children to die. DSS also knew that the Bonners were improperly licensed. Warehousing children with unfit foster parents is an obvious danger from which a trier of fact could conclude that the Defendants were deliberately indifferent, especially in light of the deaths that DSS's omissions had already caused.

All the cases construing the duty of safe placement trace their roots to Youngberg, which requires only that a defendant knew or should have known of a danger of abuse. Furthermore, Youngberg requires only lack of professional judgment, not deliberate indifference. Youngberg distinguished the line of prisoner safety cases from the institutional safety cases; in so doing, the Supreme Court reasoned that "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions are designed to punish." 457 U.S. at 321- 322. Accordingly, the Court applied the more lenient standard of professional judgment for non-penal § 1983 suits.

II. THE FOURTH CIRCUIT'S DECISION THAT SUTER V. ARTIST PRECLUDES PRIVATE ENFORCEMENT OF ALL SECTIONS OF THE AACWA IS IN DIRECT CONFLICT WITH U.S.C. SECTION 1320a-2 AND PRIOR SUPREME COURT HOLDINGS AND IS PATENTLY WRONG.

Some sections of the Adoption Assistance and Child Welfare Act of 1980 (AACWA) create federal statutory rights that are privately enforceable. The Fourth Circuit erroneously concluded that the Petitioners asserted violations of only one Section of the AACWA, 42 U.S.C. § 671(a)(10), and that the subsection creates no private cause of action for violations. (Slip Op. at 14). However, the Petitioners raised facts in the Record below which support violations of several specific AACWA provisions that the Fourth Circuit had previously held to be actionable in Darr, 838 F.2d 118. For instance, the State Department of Social Services' failures to monitor the county department violated § 671(a)(7); its failures to establish a case plan for the White Children violated § 671 (a)(16); and its failures to properly license the foster home violated § 672(c).

The court also misconstrued the breadth of this Court's decision in Suter v. Artist, 112 S. Ct. 1360 (1992) (superseded by 42 U.S.C. § 1320a-2 (1994)), (Suter was decided after the events in White) and Congress's partial reversal of that decision. Suter presently means only that § 671(a)(15) is not privately enforceable due to the "reasonable efforts" language employed by that section. See Marisol A. By Next Friend Forbes v. Giuliani, 929 F. Supp. 662 (S.D.N.Y. 1996) ("only the narrow holding in Suter remains and this Court must rewind the clock and look to cases prior to Suter to determine the enforceability of the provisions at issue in the instant case."); Jeanine B. By Blondis v. Thompson, 877 F. Supp. 1268 (E.D. Wis. 1995) ("the court must rewind the clock and look to cases prior to Suter to determine the enforceability of other provisions of the Adoptions Assistance Act.").

The court also noted that § 1320a-2 was enacted after the instant case was commenced, and thus would not apply. However, § 1320a-2 operates retroactively: "The amendment made by [this section] shall apply to actions pending on the date of the enactment of this Act . . . ." Pub. L. No. 103-382 § 555(b), 108 Stat. 4058 (1994). Thus, whether Congress's response to Suter came after this case was filed is of no moment. Congress has turned back the clock and reinstated pre-Suter AACWA decisions,

which means that Darr is once again the law of this Circuit, and the duties of the Respondents have been clear and certain since at least 1961.

By reversing part of Suter, Congress has decreed that the courts should revert back to the analysis set forth in Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990), in determining whether or not a statute creates a privately enforceable right. The Fourth Circuit, however, failed to apply the Wilder test to the various provisions of the AACWA cited by the petitioners. In Wilder, The Supreme Court formulated a three part test to determine whether a statutory provision created a privately enforceable right. The court must consider: (1) whether "the provision in question was intend(ed) to benefit the putative plaintiff"; (2) whether the provision "reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the government unit"; (3) whether "the interest of the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce." Wilder, 496 U.S. at 509.

Once these factors have been met, the burden shifts to the state actor to show congressional intent to the contrary. See Wright v. City of Roanoke Redevelopment and Hous. Auth., 479 U.S. 418, 423-24 (1987). Generally, "§ 1983 provides a remedial cause of action unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement" Id. This requires defendants to show that Congress provided "a comprehensive enforcement mechanism for the protection of the federal right" with which plaintiff's § 1983 action would be inconsistent. Harris v. James, 883 F. Supp. 1511, 1518 (M.D. Ala 1995). A showing of the availability of administrative protection is insufficient to meet this burden. .See Id. The Supreme Court has warned that courts should "not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right." Wright, 479 U.S. at 423-24. Had the Fourth Circuit applied the Wilder test, it would have found that the provisions cited in Darr and this case meet the test and in fact do created privately enforceable rights.

Several lower courts have addressed the issue of whether, after Suter and the corresponding Congressional amendment, the Adoptions Assistance and Child Welfare Act does in fact create privately enforceable rights. In Marisol, the district court reasoned that with respect to alleged violations of § 671(a), the Wilder test is met:

> With Respect to the first Wilder factor, it is clear that the members of the proposed class of plaintiffs are the intended beneficiaries of the Adoptions Assistance Act. Second, the language of § 671 (a) is mandatory and imposes a binding obligation by explicitly tying the creation of certain features of a state plan to federal funding. Finally none of the subsections of § 671(a) relied upon by plaintiffs is so vague or amorphous as to make judicial enforcement impossible. Both § 671(a)(10) and (a)(16) are clear and are not beyond the power of the Court to enforce. ... Additionally this court finds no evidence that Congress has indicated its intent to preclude private plaintiffs from seeking to enforce provisions of the Adoptions Assistance Act other than § 671(a)(15)."

929 F. Supp. at 683. Plaintiffs in the current action have similarly alleged facts supporting violations of § 671 (a)(10) and (a)(16). In its decision, the Fourth Circuit is in direct conflict with the court in Marisol in its holding that § 671(a)(10) is too vague and amorphous to be enforced by the Court.

In Jeanine B., the district court also found that § 671(a) created privately enforceable rights:

> Applying the first of the Wilder factors to this case, it is clear and undisputed that the children bringing this lawsuit are the intended beneficiaries of the Adoptions Assistance Act. As for the second factor, Congress imposed a binding obligation by explicitly tying the creation of certain features of a state plan to federal funding. The scheme and the language of § 671(a) are mandatory, and the theory of Suter - that when Congress sets out plan requirements the only enforceable right is to the plan itself and not to its implementation - has been rejected by Congress itself - the body whose intentions must be interpreted. The second prong of Wilder is met. Finally, with the exception of §671(a)(15), the provisions of §671 (a) are not too "vague and amorphous" that it is beyond the competence of the judiciary to enforce."

877 F. Supp. at 1283-84. The court then specifically held that §§ 671(a)(2), (3), (7), (10), (11), and (13) and §627 were not too vague or amorphous or beyond the court's ability to understand and enforce. Again, the Fourth Circuit's decision that § 671(a)(10) is too vague and amorphous to judicially enforce is in direct conflict with the Jeanie B. court. See also Harris, 883 F. Supp. 1511; Davis v. McClaran, 909 S.W.2d 412 (Tenn. 1995); Norman v. McDonald 930 F. Supp. 1219 (N.D.Ill. 1996).

In this case, the Supreme Court would have the opportunity to clarify the impact of the congressional statute's impact on this Court's decision in Suter and to clarify whether, as held in Darr and the cases cited above, sections in the AACWA create privately enforceable rights.

III. THE FOURTH CIRCUIT FAILED TO RECOGNIZE PLAINTIFFS' PROCEDURAL DUE PROCESS CLAIMS AND IS IN DIRECT CONFLICT WITH OTHER CIRCUIT COURTS AND THE SUPREME COURT

The Petitioners do not assert, as stated at page 12 of the Slip Opinion, a substantive claim based on the South Carolina Child Protection Act. Petitioners do assert a denial of procedural due process resulting from an inadequate investigation before the White children were removed and while they were in custody as well as failure on behalf of the Defendants to comply with State statutory requirements which would have protected the White children from abuse at the hands of their foster parents. In Board of Regents v. Roth., 408 U.S. 564 (1972), the Supreme Court explained:

> The Fourteenth Amendment's procedural protection of property as a safeguard of the security of interests that a person has already acquired in specific benefits ... To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Id at 576-577.

In DeShaney, the Supreme Court recognized the possibility of such a claim attaching to a state's child welfare statutes under a Board of Regents v. Roth evaluation. The Supreme Court held that the substantive portion of the Fourteenth Amendment did not require the State to protect a child from his or her parents, however, the Supreme Court then noted in footnote two (2) that:

> Petitioners also argue that the Wisconsin child protection statutes gave Joshua an "entitlement" to receive protective services in accordance with the terms of the statute, **an entitlement which would enjoy due process protection against state deprivation** under our decision in Board of Regents v. Roth, 408 U.S. 564 (1972).... But this argument is made for the first time in petitioner's

> brief to this Court: it was not pleaded in the complaint, argued to the Court of Appeals as a ground for reversing the District Court, or raised in the petition for certiorari. We therefore decline to consider it here.

489 U.S. at 196 n.2. (emphasis added).

Following the Supreme Court's analysis in Roth and DeShaney, the Court must look to State law to determine whether or not the State has created an entitlement in children who are the subject of reports of suspected abuse to an adequate and thorough investigation and to be protected during the investigation. If the state has created this entitlement, then the Court must determine whether the Plaintiff was denied that right without due process. If the court finds that the state denied Plaintiff her right to an adequate and thorough investigation and to be protected during that investigation without due process, the Defendants may be held liable for that violation under the Fourteenth Amendment.

Lower courts faced with the question of whether or not various state child welfare statutes give children an entitlement to protective services which would enjoy procedural due process protection against state deprivation are divided. See Meador, 902 F.2d at 476-477, (holding Kentucky child protection statutes give plaintiffs entitlement to protective services of which they may not be deprived with due process of law), cert. denied, 498 U.S. 867 (1990); Taylor, 818 F.2d at 798-800, (holding children in foster care can state claim based upon deprivation of liberty interest when officials fail to follow guidelines mandated by Georgia foster care and placement scheme); Powell v. Georgia Dep't of Human Resources, 918 F. Supp. 1575, 1580-82 (S.D. Ga. 1996) (holding comprehensive and mandatory nature of Georgia Child Abuse Protocol vests abused children with constitutionally protected entitlement to procedures and protections mandated therein); Eric L. ex rel. Schierberl v. Bird, 848 F. Supp. 303, 308 (D.N.H. 1994) (refusing to dismiss plaintiff's claims that New Hampshire child protection statute creates entitlement to certain services); Baby Neal v. Casey, 821 F. Supp. 320, 338-39 (E.D. Pa. 1993) (denying summary judgement on plaintiff's procedural due process claims); Chrissy F. ex rel. Medley v. Mississippi Dep't of Pub. Welfare, 780 F. Supp. 1104, 1127-1129 (S.D. Miss. 1991) (holding provisions of Youth Court law at issue created property interests enforceable under the due process clause), aff'd in part, rev'd in part, 995 F.2d 595 (5th Cir. 1993); Marisol, 929 F. Supp. 622 (holding that New York's Child Protective Services laws are more than

mere procedural guidelines and give plaintiffs an entitlement to protective services of which they can not be deprived without due process). But see Tony L. ex rel. Simpson v. Childers, 71 F.3d 1182 (6th Cir. 1995) (holding Kentucky child abuse reporting statute does not vest plaintiffs with constitutionally-protected property interest), cert. denied __ U.S. __ (1994); Doe ex rel. Nelson v. Milwaukee County 903 F.2d 499, 502-05 (7th Cir. 1990) (holding that Wisconsin child abuse reporting statute does not vest plaintiffs with constitutionally-protected property interest) Coker ex rel. Coker v. Henry, 813 F. Supp. 567, 569-70 (W.D. Mich. 1993) (holding Michigan child protection law not sufficiently explicit and mandatory to create claim of entitlement to protective services) aff'd, 25 F.3d 1047 (6th Cir. 1994); B.H. v. Johnson, 715 F. Supp. 1387, 1399-1400 (N.D. Ill. 1989) (holding plaintiffs have no constitutionally protected liberty or property interest in Illinois Abuse and Neglected Child Reporting Act); Child v. Beame, 412 F. Supp. 593, 604-05 (S.D.N.Y. 1976) (holding plaintiffs have no constitutionally protected property interest in permanent adoptive placement).

The State of South Carolina has chosen to create such an entitlement in children who are the subject of a report of abuse: S.C. Code Ann. §§ 20-7-650 (B) (must be staffed adequately with persons trained in the investigation of suspected child abuse and neglect and in the provision of services to abused and neglected children and their families), 20-7-650(I) (the local child protective service agency is charged with providing, directing, or coordinating the appropriate and timely delivery of services to children found to be abused or neglected and those responsible for their welfare), and 20-7-650(O) (the agency in all instances shall act in accordance with the policies, procedures, and regulations promulgated and distributed by the State Department of Social Services pursuant to this chapter) (emphasis added). These policy and procedures give detailed requirements for the monitoring of foster children and foster homes. When this right is arbitrarily denied a child without adequate due process, then that child's constitutional rights have been violated.

The South Carolina Child Protection Act, S.C. Code Ann. § 20-7-480 et. seq., imposes upon the local child protection agency and its social workers a special duty to investigate and intervene in cases involving child abuse, and a violation of that duty may give rise to a private cause of action. Jensen v. Anderson County Dep't of Soc. Serv., 403 S.E.2d 615 (S.C. 1991). This affirmative duty creates a property interest that runs to children like the Plaintiffs who are the subjects of reports of suspected abuse.

"Property interests.. . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Board of Regents v. Roth 408 U.S. at 577. Procedural due process rights arise when a party has been deprived of a recognized property or liberty interest without the procedural protection of the Fourteenth Amendment. Baby Neal, 821 F. Supp. 320.

In Jensen, the South Carolina Supreme Court held that, while generally there is no common law duty to act, an affirmative legal duty may be created by statute. 403 S.E.2d at 617. The court then analyzed § 20-7-650 of the South Carolina Code. and found that:

> The essential purpose of these sections is to protect abused children when their cases have been reported to DSS officials. Such children comprise a clearly identifiable class; Michael Clark was plainly a person within the class. These sections impose on the local child protection agency and its social workers a specific duty to investigate and to intervene in cases involving children like Michael.

403 S.E.2d at 618. The Court then concluded that these statutory sections gave rise to a private right of action when violated. 403 S.E.2d at 620. See also Babcock v. State, 809 P.2d 143 (Wash. 1991) (requiring caseworkers to act in accordance with statutory and regulatory procedures in every respect, and that their actions had to be reasonable and that their statutory duties required their actions.)

Conversely, when South Carolina social workers violate their duty to thoroughly and adequately investigate reports of suspected child abuse and, as a result, improperly remove a child and place him or her in grave danger, they deprive the children of their procedural due process rights as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

> Where a state statute mandates that officials take certain affirmative actions to ensure the well-being and promote the welfare of a child, that child can state a due process claim based upon deprivation of a property interest where officials have failed to follow the statutory mandate.

Chrissy F., 708 F. Supp. at 1128 (S.D. Miss. 1991).

The Constitution, of course, creates no property rights. But where the state creates a liberty or property interest, and later divests the holder of that interest without proper procedural mechanisms, constitutional liability can be vindicated under § 1983, which is the nature of the claim at issue here. The Respondents are responsible for the selection, investigation, training, and supervision of foster homes and foster children, in order to protect helpless foster children who are isolated in state custody. The Respondents could not arbitrarily deprive Keena White of these vested entitlement, see Jensen, 403 S.E.2d 615, without violating the procedural guarantees of the Constitution.

IV. THE QUESTIONS PRESENTED ARE IMPORTANT BECAUSE THEY CONCERN A FUNDAMENTAL RIGHT OF VAST NUMBERS OF CHILDREN AND FAMILIES, INVOLVE THE ADMINISTRATION OF A COSTLY FEDERAL PROGRAM, AND IMPLORE THE COURT TO CLARIFY DESHANEY V. WINNEBAGO COUNTY DSS.

This case is important and should be heard because it begs the court to clarify the contours of a child's fundamental constitutional right to reasonable safety while in the custody of the state. Most compelling is that it affects children who are wholly unable to help themselves. A child cannot handwrite a petition to any court, like the prisoner-petitioner who petitioned this Court in Estelle. Children like Keena White have no choice but to rely on the humanity of their keepers.

This case is not just about Keena White. It is about all the Keena Whites in state custody right now. It is about the 9,400 South Carolina children who spent an average of twenty-eight months in foster care at the same time Keena White was in foster "care." After South Carolina passed legislation in 1993 forbidding convicts and prior child abusers from being licensed foster parents, 160 children had to be removed from fifty homes. This case concerns them, because many bear the scars of their placements.

Over one-half million children were in foster care nationally at the same time Keena White perished in that institution. Twenty-three states found themselves answering to federal courts that year because of problems in their foster care systems. This case is about those children, and about those who have since been seized by the states for their own protection.

When Keena White was slain in her foster home, sixty eight of her fellow South Carolina foster children were abused or neglected by the foster parents who were supposed to protect them from their natural parents. Over the three-year period preceding Keena's untimely demise, 122 South Carolina foster children suffered in silence. This case is about them. Just to the north, ninety-six North Carolina children endured abuse or neglect in foster homes in 1993. Five South Carolina children died of abuse or neglect in foster homes from 1991 to 1994. This case is about them, not just Keena White.

This case is about the $38 million North Carolina spends on foster care, and the $31.8 million South Carolina will spend this year. It is about the $ 1.5 billion that the Adoption Assistance and Child Welfare Act will provide to the States for foster care and adoptions, and the administration of those funds and their mandates.

This case asks the Court to reinforce its holdings in West v. Atkins, Estelle v. Gamble, and Youngberg v. Romeo. No extension of law is sought, nor is one needed. It has long been the law of the land that once a state invades an individual's liberty, properly or otherwise, it assumes a constitutional duty to reasonably look after the welfare of its ward. But the unfortunate fact is that many defendants have misused the Court's teachings in DeShaney v. Winnebago to escape the clear command of the Eighth Amendment and Fourteenth Amendment as set forth in Estelle, Youngberg and their progeny. In DeShaney, the Court refused to extend the proscriptions of the Fourteenth Amendment outside custodial relationships, and declined to address the duties that would attach to the custodial relationship created by state foster care, on the facts of that case. 489 U.S. at 202 n.9. However, the Court explained that such duties could attach if the facts of the case were otherwise: "It is the State's affirmative act of restraining the individual's freedom to act on his own behalf - through incarceration, institutionalization, or other similar restraint of personal liberty - which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means." 489 U.S. at 201. DeShaney also emphasized "it [the State] played no part in their creation, nor did it do anything to render him any more vulnerable to them." Id. at 201.

In this case, the proper facts are present, and the confusion and disarray created by those who have misapplied the clear authorities

explained yet again in DeShaney can perhaps be finally settled. This case presents the facts necessary for the Court to take up where it left off in DeShaney.

Keena and Cindy White lived in Aiken, South Carolina, on the southern edge of the Fourth Circuit, where a state can apparently seize a child and ignore her welfare with absolute impunity. Had the White's lived just eight miles South in the Eleventh Circuit, where a state must account for failures of its affirmative duties because the Fourteenth Amendment, Youngberg, and Estelle are given for their plain and uncomplicated meaning, see, Taylor, 818 F.2d 791, Keena's death might have been prevented; but had it not, this ultimate deprivation of her most fundamental rights would have properly been vindicated. So long as there is even one child in such danger, this is an important matter which should be decided by this Court.

CONCLUSION

Certiorari should be granted in this case because several Circuits disagree as to whether foster children are in state custody, whether foster parents act under color of law, and whether the state owes an affirmative duty of protection to foster children. The White decision also conflicts with applicable decisions of this Court. The Decision of the Fourth Circuit was erroneous, and this case poses important questions that affect numerous families and governments, as well as the administration of costly federal and state social programs.

Respectfully Submitted,

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Supreme Court, U.S.
FILED

Docket No. 97-204 JUL 31 1997

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

KEENA WHITE, by her Personal Representative,Cindy White, CINDY WHITE, Individually, and Cindy White as Guardian ad Litem for DEIDRE JONES, CLIFFORD WHITE, JR., PATRIC WHITE, DANIEL WHITE, and DARREN WHITE,

Petitioners,

-- against --

RUBY CHAMBLIS; TINA WERTS; TANGA GILCHRIST; CLARENCE GRAHAM; CASSIE WILSON; MARIE DUNNAM; RAMONA FOLEY; BARRY DOWD; WILBERT LEWIS; JAMES C. SOLOMON, JR.; JOANNE SCHAEKEL; DESIREE COUNCIL,

Respondents,

-- and --

ANTHONY BONNER, GLADYS BONNER, and TONY BONNER,

Defendants.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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APPENDIX

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29pp

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KEENA WHITE, by her Personal Representative Cindy White; CINDY WHITE, individually, and Cindy White as Guardian Ad Litem for Deidre Jones, Clifford White, Jr., Patric White, Daniel White and Darren White,

Plaintiffs-Appellees,

v.

RUBY CHAMBLISS,

Defendant-Appellant,

and

TINA WERTS; TANGA GILCHRIST; CLARENCE GRAHAM; CASSIE WILSON; MARIE DUNNAM; RAMONA FOLEY; BARRY DOWD; WILBERT LEWIS; JAMES C. SOLOMON, JR.; JOANNE SCHAEKEL; ANTHONY BONNER; GLADYS BONNER; TONY BONNER; AIKEN COUNTY DEPARTMENT OF SOCIAL SERVICES (ACDSS); DESIREE COUNCIL,

Defendants.

No. 95-3025

KEENA WHITE, by her Personal Representative Cindy White; CINDY WHITE, individually, and Cindy White as Guardian Ad Litem for Deidre Jones, Clifford White, Jr., Patric White, Daniel White and Darren White,

Plaintiffs-Appellees,

v.

TINA WERTS; TANGA GILCHRIST; CLARENCE GRAHAM; MARIE DUNNAM; RAMONA FOLEY; BARRY DOWD; WILBERT LEWIS; JAMES C. SOLOMON, JR.; JOANNE SCHAEKEL; DESIREE COUNCIL,

Defendants-Appellants,

and

CASSIE WILSON; ANTHONY BONNER; GLADYS BONNER; TONY BONNER; AIKEN COUNTY DEPARTMENT OF SOCIAL SERVICES (ACDSS); RUBY CHAMBLISS,

Defendants.

No. 95-3078

KEENA WHITE, by her Personal Representative Cindy White; CINDY WHITE, individually, and Cindy White as Guardian Ad Litem for Deidre Jones, Clifford White, Jr., Patric White, Daniel White and Darren White,

Plaintiffs-Appellees,

v.

CASSIE WILSON,

Defendant-Appellant,

and

TINA WERTS; TANGA GILCHRIST; CLARENCE GRAHAM; MARIE DUNNAM; RAMONA FOLEY; BARRY DOWD; WILBERT LEWIS; JAMES C. SOLOMON, JR.; JOANNE SCHAEKEL; ANTHONY BONNER; GLADYS BONNER; TONY BONNER; AIKEN COUNTY DEPARTMENT OF SOCIAL SERVICES (ACDSS); DESIREE COUNCIL; RUBY CHAMBLISS,

Defendants.

No. 95-3088

Appeals from the United States District Court
for the District of South Carolina, at Aiken.
Charles E. Simons, Jr., Senior District Judge.
(CA-93-3058-1-6)

Argued: March 6, 1997

Decided: April 30, 1997

Before WILKINSON, Chief Judge, LUTTIG, Circuit Judge, and BLACK, Senior United States District Judge for the District of Maryland, sitting by designation.

Reversed by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Luttig and Senior Judge Black joined.

COUNSEL

ARGUED: Elizabeth Herlong Campbell, NEXSEN, PRUET, JACOBS & POLLARD, L.L.P., Columbia, South Carolina, for Appellants. Sara M. Walker, Columbia, South Carolina, for Appellees. **ON BRIEF:** Susan P. McWilliams, NEXSEN, PRUET, JACOBS & POLLARD, L.L.P., Columbia, South Carolina; Charles E. Carpenter, Jr., RICHARDSON, PLOWDEN, CARPENTER & ROBINSON, P.A., Columbia, South Carolina; Douglas McKay, Jr., Ruskin C. Foster, MCKAY, MCKAY, HENRY & FOSTER, P.A., Columbia, South Carolina; William L. Pope, Roy F. Laney, POPE & ROGERS, Columbia, South Carolina, for Appellants.

OPINION

WILKINSON, Chief Judge:

Cindy White brought suit under 42 U.S.C. § 1983 against several officials of the South Carolina Department of Social Services ("the DSS defendants"). White claims the DSS defendants violated her substantive and procedural due process rights by removing her children from her custody and violated her daughter Keena's rights by placing Keena in a home where she died from abuse at the hands of her foster parents. The district court denied the DSS defendants' motion for summary judgment, and those defendants now appeal.

Keena's death was a tragic event. It did not, however, result from the DSS defendants' violation of any "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Accordingly, we find that the DSS defendants were entitled to qualified immunity and reverse the judgment of the district court.

I.

Late on the night of November 20, 1991, Cindy White brought her eighteen-month-old son, Daniel, to the emergency room of the University Hospital in Augusta, Georgia with a broken arm. The treating physician, Dr. Shearer, determined that Daniel had sustained a spiral fracture to his arm. A spiral fracture is caused by a powerful twisting force and is a strong indicator of child abuse. Because White was a South Carolina resident, the hospital staff contacted the Aiken County DSS office to report a suspected case of abuse.

When Tanga Gilchrist, the DSS employee on call, arrived at the hospital, she questioned White about Daniel's injury. White claimed she was not in Daniel's bedroom when he broke his arm, but speculated he might have fallen out of his crib and caught his arm in its slats. Dr. Shearer and an orthopedist, Dr. Hankerson, both found White's explanation to be "very unlikely," and Dr. Shearer stated that "the child needed to be in custody."

On November 22, Gilchrist visited the White residence to investigate Daniel's bed and see for herself whether Daniel's injury might have occurred as the result of a fall. She found that the slats of the bed were far enough apart that her arm, which was larger than Daniel's, did not get caught between them. She further noted that Daniel's bed was less than one foot from the floor. This investigation, in combination with the two doctors' opinions, convinced Gilchrist that White's explanation of Daniel's broken arm was implausible. Gilchrist and her supervisor, Ruby Chambliss, determined that an *ex parte* petition for custody of White's children should be submitted to the Family Court for Aiken County.

On November 26, 1991, DSS filed a petition for emergency protective custody and a petition for removal in Aiken County Family Court. The judge signed an *ex parte* order granting emergency protective custody on November 26, which DSS received on December 3. On the day the order was received, Gilchrist and another case worker accompanied sheriff's office personnel to White's trailer and took custody of Daniel and the five other White children.

At a hearing the following day, which White attended, the judge determined that there was probable cause for the minor children to be

taken into emergency custody. The judge further concluded that in light of the evidence of abuse to Daniel, the children should remain with DSS pending a merits hearing. DSS placed the White children in various foster homes, with eleven-month-old Keena White going to the home of Anthony and Gladys Bonner.

In the weeks between the December 4 emergency protective custody hearing and the scheduled merits hearing, White was allowed supervised visitation with her children. During these visits, White alleges that she noticed scratches and bruises on her children, including Keena. She wrote a letter to Senator Strom Thurmond expressing her concerns. On December 20, Senator Thurmond wrote a letter to DSS on White's behalf. Cassie Wilson, one of the caseworkers on the White case, testified that White had told her that the children routinely sustained minor injuries due to playing or fighting with one another. Furthermore, Tina Werts, another caseworker, testified that she had taken Keena to the doctor with a cold on January 3, and that Keena had appeared to be in good condition on that date. DSS thus concluded that any alleged injuries were the "results of natural child play."

On January 18, 1992, approximately six weeks after she had been placed with the Bonners, Keena died from blows to the head while in the Bonners' care. A forensic pathologist determined that Keena's death was "best classified as homicide," but law enforcement officials were unable to determine who had struck Keena, so no criminal charges were filed. DSS removed all foster children from the Bonners' home and placed no other children with the Bonners after Keena's death. After an investigation, the DSS revoked the Bonners' license due to abuse and neglect.

At the merits hearing on January 24, 1992, DSS and White submitted a settlement agreement in which White agreed to acknowledge that Daniel White had been abused by an "unknown" perpetrator. DSS returned legal and physical custody of the children to White on the condition that she receive a psychological evaluation, including observation of the family unit, at the expense of DSS.

On November 18, 1993, White brought this lawsuit as personal representative of the estate of Keena for Keena's wrongful death, pain

and suffering, and violations of Keena's due process rights. She also sued as guardian *ad litem* for her five children and on her own behalf claiming DSS violated both her and her children's due process rights. Ruby Chambliss, Tanga Gilchrist, Cassie Wilson, Tina Werts, and various other DSS officials were named as defendants in the suit along with the Bonners.

After extensive discovery, the DSS defendants filed motions for summary judgment based on qualified immunity which were denied by the district court. The DSS defendants then filed the instant appeal.

II.

Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). White alleges constitutional violations in three phases of DSS's actions. First, she maintains that the DSS defendants violated her family's constitutional rights in the initial decision to remove her children. Second, she contends that Keena's due process rights were violated when she was placed with the Bonners. Lastly, she contends that the DSS defendants did not adequately protect Keena's safety after she was placed in the Bonners' care. We shall review these contentions in turn.[1]

A.

White first asserts that DSS unlawfully seized her children and that the illegal seizure violated her right to custody. This is no idle claim.

[1]The appeal of the district court's denial of qualified immunity is properly before this court on interlocutory review. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). In this case, the district court failed to make any findings or undertake any analysis in support of its denial of qualified immunity. As a result, we must engage in an independent examination of the record, viewed in the light most favorable to the nonmoving party. *Johnson v. Jones*, 115 S.Ct. 2151, 2159 (1995); *Winfield v. Bass*, 106 F.2d 525, 533 (4th Cir. 1997) (en banc).

As we have recognized, "[t]here are few rights more fundamental in and to our society than those of parents to retain custody over and care for their children, and to rear their children as they deem appropriate." *Jordan ex rel. Jordan v. Jackson*, 15 F.3d 333, 342 (4th Cir. 1994). These rights, however, are not absolute. The parent's right to custody is subject to the child's interest in his personal health and safety and the state's interest as *parens patriae* in protecting that interest. *Id.* at 346; *see also Renn v. Garrison*, 100 F.3d 344, 349 (4th Cir. 1996).

The DSS defendants removed the White children under the authority of law which this court has adjudged constitutional. South Carolina law limits the state's authority to assume emergency protective custody over children to those circumstances where "there is probable cause to believe that by reason of abuse or neglect there exists an imminent danger to the child's life or physical safety." S.C. Code § 20-7-610(F)(2); *see also* S.C. Code § 20-7-610 (A)(1). Recently we upheld the constitutionality of a Virginia statute which similarly constrained the state's power to take emergency custody of children, noting that "[w]hile there is always a risk of error when an emergency removal of a child from his parents' custody is required, the Commonwealth has substantially reduced that risk at the threshold by the imposition of significant substantive limitations upon the removal authorization." *Jordan*, 15 F.3d at 346.

Moreover, substantial evidence supported the DSS defendants' decision to pursue an order for the removal of the White children. Gilchrist sought the opinions of two medical professionals who told her that the spiral fracture Daniel had suffered was strong evidence of child abuse. Gilchrist also consulted with White and listened to her explanation of Daniel's injury. Gilchrist was entitled to rely on the professional judgments of the two physicians that White's explanation of Daniel's injury was "highly unlikely." *See Youngberg v. Romeo*, 457 U.S. 307, 324-25 (1982); *Hogan v. Carter*, 85 F.3d 1113, 1117 (4th Cir. 1996) (en banc). Moreover, Gilchrist's examination of Daniel's crib further demonstrated that White's explanation of Daniel's injury was implausible. Gilchrist thus came to the reasonable conclusion that there was a significant probability of child abuse within the White household. And, as we held in *Weller v. Dep't of Social Servs. for Baltimore*, 901 F.2d 387, 391 (4th Cir. 1990), removal of a child

in an emergency action is constitutional when there is "some evidence of child abuse."

White also contends that she and her children were denied procedural due process. We disagree. The Fourteenth Amendment interest that White possesses runs to court proceedings provided under state law and not to the discretionary discharge by DSS of its duties. *Weller*, 901 F.2d at 392. As to those court procedures, we have noted that "the requirements of process may be delayed where emergency action is necessary to avert imminent harm to a child." *Jordan*, 15 F.3d at 343; *Weller*, 901 F.2d at 393. In this case, DSS sought a judicially approved *ex parte* order before removing the White children. Furthermore, a full hearing was held within twenty-four hours of the removal. DSS therefore fully complied with this circuit's directive that such a hearing should be held soon after an emergency removal. *Jordan*, 15 F.3d at 351. In *Jordan*, we approved a hearing which was held some 65 hours after a child was removed from his home. Perforce, the much prompter hearing held in this case cannot be judged constitutionally invalid. Under these circumstances, we cannot conclude that White was denied the process she was due.[2]

The discretionary judgment which was made in removing the White children was obviously not an easy one. It involved weighing professional opinions of child abuse against the obvious interests in maintaining the integrity of a household. Here the tug and pull of competing concerns is evident. Premature action by a social worker can disrupt the legitimate interest parents possess in raising and disciplining their children. On the other hand, a failure to act can leave a child defenseless in the face of physical abuse and brutality. These types of decisions are precisely the sort that the doctrine of qualified immunity is designed to protect. *See Wood v. Strickland*, 420 U.S.

[2]White also alleges that she and her children were denied their constitutional right of access to the courts. White does nothing more, however, than posit the existence of an abstract right, and that is not sufficient to defeat qualified immunity. *See Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987); *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992). White has failed to point to any facts which would demonstrate that her or her children's right of access to the courts was violated by the DSS defendants in this case.

308, 319-20 (1975). If section 1983 liability attaches too readily to removal and placement decisions, the course of public agencies would invariably become one of inaction, thus leaving children in abusive environments. The facts presented by White reveal that the DSS defendants violated no "clearly established" law in removing White's children from her custody. Therefore, qualified immunity must lie. *Harlow*, 457 U.S. at 818.

B.

White next claims that the DSS defendants violated Keena's constitutional rights when they placed her in the Bonner home. A negligent placement, of course, would implicate no federal rights for questions of negligence have long been regarded by the Supreme Court as within the province of state law. *Daniels v. Williams*, 474 U.S. 327, 328 (1986). White, however, refers us to circuit cases where DSS defendants were alleged to have crossed the line from negligence into deliberate indifference thus implicating substantive Fourteenth Amendment protections. *See K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990) ("The only right in question in this case is the right of a child in state custody not to be handed over by state officers to a foster parent or other custodian, private or public, whom the state knows or suspects to be a child abuser."); *accord Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir. 1990); *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987); *Doe v. New York City Dept. of Social Servs.*, 649 F.2d 134, 141 (2d Cir. 1981).

Whatever the clearly established law on this question, White's claim simply falls short on the facts. The summary judgment record contains no evidence to indicate that any of the DSS defendants knew or suspected that the Bonners were abusive foster parents when they placed Keena in their care. Indeed, the Bonners were licensed by the DSS, and White points to no evidence indicating that the Bonners had previously been accused of, or investigated for, child abuse. A claim of deliberate indifference, unlike one of negligence, implies at a minimum that defendants were plainly placed on notice of a danger and chose to ignore the danger notwithstanding the notice. There is simply no evidence that the DSS defendants were on notice of any problem at the time the placement decision was made.

C.

White also asserts that the DSS defendants had a clearly established duty to protect Keena from abuse after she was placed with the Bonners. In order for a right to be "clearly established," the Supreme Court has instructed that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

In *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989), the Supreme Court held that the state had no affirmative duty to protect a child from abuse when that child was not in state custody. However, the Court specifically declined to determine whether placing a child in foster care would constitute the sort of custodial relationship that would give rise to a duty of protection. *Id.* at 201 n.9. By 1991, when the events relevant to the instant suit occurred, this circuit had squarely held that children placed in foster care had no federal constitutional right to state protection. In *Milburn v. Anne Arundel County Dep't of Social Servs.*, 871 F.2d 474 (4th Cir. 1989), the court considered a claim brought by parents who had placed their child in the state foster care system. While in foster care, the child was subjected to abuse and required medical treatment on four separate occasions. The child's parents brought suit against the state DSS and several officers of the DSS alleging that they had breached the child's right to protection. The court noted that the state had no affirmative constitutional obligation to protect individuals against private violence, *id.* at 476, and went on to reject the parents' claim, reasoning that foster parents were private actors and not agents of the state:

> The State of Maryland was not responsible for the specific conduct of which plaintiff complains, that is, the physical child abuse itself. It exercised no coercive power over the Tuckers; neither did it encourage them. The care of foster children is not traditionally the exclusive prerogative of the State. Thus . . . the Tuckers should not be considered state actors.

Id. at 479 (citations omitted).

Nothing in *Milburn* limited its application to situations where parents had voluntarily placed their children in foster care, and *Milburn* was not interpreted as being so limited in subsequent Fourth Circuit cases. In *Weller*, for example, the court relied on *Milburn* for the proposition "that harm suffered by a child at the hands of his foster parents is not harm inflicted by state agents." 901 F.2d at 392. Given the state of this circuit's law on the issue and the absence of controlling Supreme Court authority, we cannot say that a right to affirmative state protection for children placed in foster care was clearly established at the time of Keena's death.

White next argues that the South Carolina Child Protection Act forms the basis of a clearly established right to protection while in foster care which is enforceable under 42 U.S.C. § 1983. We disagree. The Supreme Court has made clear that section 1983 provides a cause of action for "violations of federal statutory as well as constitutional law." *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). Following *Thiboutot*, this circuit explicitly rejected the contention that state child welfare statutes create substantive due process rights enforceable through section 1983. For example, in *Weller*, we held: "If Weller is seeking compliance with state law, this is not the proper forum. Even if BCDSS did violate state laws, it is well settled that violations of state law cannot provide the basis for a due process claim." 901 F.2d at 392 (citation omitted); *see also Hodge v. Jones*, 31 F.3d 157, 168 (4th Cir. 1994). Indeed, this circuit has specifically rejected the contention that the very statute at issue in this case — the South Carolina Child Protection Act — creates substantive rights enforceable through a section 1983 action. *See Jensen v. Conrad*, 747 F.2d 185, 195 n.12 (4th Cir. 1984).[8]

[8]Our decision in *Better Government Bureau, Inc. v. McGraw*, 106 F.3d 582 (4th Cir. 1997), is not to the contrary. That case referred to state law to determine only whether an official performed an act "clearly established to be beyond the scope of his discretionary authority." *Id.* at 592. *Better Government Bureau*, therefore, is inapplicable here as the defendants in this case are being sued for discretionary judgment calls that clearly fell within the scope of their duties as social workers. Moreover, *Better Government Bureau* had not been decided when the actions relevant to this suit occurred.

Because the South Carolina Child Protection Act does not create a clearly established substantive federal right, the immunity claims of the DSS defendants do not rise or fall on questions of state law. As we noted in *Jordan*, the whole area of domestic relations has "'been left to the States from time immemorial, and not without good reason.'" 15 F.3d at 348 (quoting *Santosky v. Kramer*, 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting)). Domestic violence of all varieties is one of the most wrenching problems that any society must face, but to federalize the issue through the vehicle of section 1983 is not the answer. That is not to say that there should be no remedy, but rather that where state officials acting within the scope of their discretionary duties commit violations of state law, one must look to state law and to state courts to pursue those remedies that the state has provided. In South Carolina, for example, aggrieved individuals may pursue a state law cause of action under the South Carolina Child Protection Act for public officials' alleged failures to abide by the directives of that statute. *See Jensen v. Anderson County Dep't of Social Servs.*, 403 S.E.2d 615, 617 (S.C. 1991).

Lastly, White argues that since South Carolina receives federal funds for its child welfare program, plaintiffs had an enforceable right to protection through the provisions of the federal Adoption Assistance and Child Welfare Act ("AACWA"). Specifically, White points to 42 U.S.C. § 671(a)(10), which states:

> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which —
>
> > (10) provides for the establishment or designation of a State authority or authorities which shall be responsible for establishing and maintaining standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes, including standards related to admission policies, safety, sanitation, and protection of civil rights, and provides that the standards so established shall be applied by the State to any foster

> family home or child care institution receiving funds under this part or part B of this subchapter.

The Supreme Court addressed the availability of privately enforceable rights under the AACWA in *Suter v. Artist M.*, 503 U.S. 347 (1992). Section 671(a)(15) of that statute requires a state to make "reasonable efforts" to return children placed in foster care to their homes. The Court held that this section created no private right of action under section 1983 because (1) the section did not state a clear requirement of any conditions on state receipt of federal grants, *id.* at 356-57; (2) the statute did not include any "statutory guidance . . . as to how 'reasonable efforts' are to be measured," *id.* at 360; and (3) section 42 U.S.C. § 671(b) provided for the establishment of an alternative enforcement mechanism, *id.* at 360-61.

For the same reasons, section 671(a)(10) does not create an enforceable right. The requirement that a state's plan be "reasonably in accord with recommended standards of national organizations," is no more specific than section 671(a)(15)'s "reasonable efforts" requirement. Furthermore, the AACWA provides no "statutory guidance" to clarify the meaning of the requirements of 671(a)(10). Lastly, section 671(a)(10) is enforceable through the same alternative enforcement mechanism provided for section 671(a)(15). As the Supreme Court noted in *Suter*, "[t]he Secretary [of Health and Human Services] has the authority to reduce or eliminate payments to a State on finding that the State's plan no longer complies with § 671(a) or that 'there is a substantial failure' in the administration of a plan such that the State is not complying with its own plan." 503 U.S. at 360. *Suter* thus forecloses the argument that section 671(a)(10) of the AACWA provides the source for an enforceable right through section 1983. *See also Wildauer v. Frederick County*, 993 F.2d 369, 373 (4th Cir. 1993).[4]

---

[4]The congressional response to *Suter* codified at 42 U.S.C. § 1320a-2 does not alter our view. As an initial matter, that response came after the events relevant to this case. Further, Congress made clear that the statute was "not intended to alter the holding in *Suter v. Artist M.* that section 671(a)(15) . . . is not enforceable in a private right of action." 42 U.S.C. § 1320a-2. Lastly, *Suter* itself was not a novel holding, but rather rested upon settled legal principles with regard to private rights of action in the context of the AACWA.

We are again mindful that this case has involved the loss of a child's life. We are unable, however, from the record before us to attribute this sad occurrence to constitutional or federal statutory defalcations of the defendants in this case. The only evidence in the record indicating potential abuse by the Bonners is White's complaint regarding bruises and scratches on Keena and her other children. White, however, had told Cassie Wilson, a DSS caseworker, that her children often sustained such injuries in the course of playing or fighting. Furthermore, Tina Werts, another caseworker, took Keena to the doctor for a cold on January 3 and observed that she appeared to be in good condition. Given these circumstances, DSS reasonably concluded that any scratches and bruises on Keena arose from normal child play.

We are reminded again that the defense of qualified immunity is often asserted in the most difficult of cases. Yet it is precisely for the hard case that the immunity exists. The availability of immunity cannot be judged solely by tragedies that later occur or by mistakes that later come to light. Knowing what we know now, no child would have been placed in the care of the Bonners. But now is not then, and few mortals stand unscathed by hindsight. The question under qualified immunity is thus whether fallible and imprescient human beings acted reasonably on the law as it stood and on the facts as they were known at the time the action was taken. *Anderson*, 483 U.S. at 641. On this record, we are unable to find that the standard of objective reasonableness applied to the actions of public officials has been transgressed.

III.

For the foregoing reasons, we conclude that the DSS defendants are entitled to qualified immunity. Because the district court erred in denying their motion for summary judgment, we hereby reverse.

REVERSED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

CIVIL ACTION NO. 1:93-3058-6

KEENA WHITE, by her personal representative Cincy White, CINDY WHITE, Individually, and CINDY WHITE as Guardian ad Litem for DEIDRE JONES, CLIFFORD WHITE, JR., PATRICK WHITE, DANIEL WHITE, and DARREN WHITE,	)	
Plaintiffs,	)	ENTERED 11/9/95
-vs-	)	ORDER
TINA WERTS, TANGA GILCHRIST, CLARENCE GRAHAM, RUBY CHAMBLIS, CASSIE WILSON, MARIE DUNNAM, RAMONA FOLEY, BARRY DOWD, WILBERT LEWIS, JAMES C. SOLOMON, JR., JOANNE SCHAEKEL, DESIREE COUNCIL, ANTHONY BONNER, GLADYS BONNER, and TONY BONNER,	)	
Defendants.	)	

This civil rights action, alleging the abuse and death of Keena White and the abuse of her siblings while in foster care, was brought against (1) certain employees of the Aiken County Department of Social Services in their individual capacities (Gilchrist, Werts,

Graham, Chambliss, Wilson, Dunnam); (2) certain employees of the South Carolina Department of Social Services in their individual capacities (Foley, Dowd, Lewis, Solomon, Schaekel, Council); and (3) the foster parents of Keena White, and the foster parents' son (Anthony, Gladys, and Tony Bonner).

The amended Complaint alleges that the Bonners caused the death of Keena White by child abuse and that the Bonners had previously abused other foster children and their own grandchildren. The other individual defendants are alleged to have contributed to the death of Keena White by their acts and/or omissions as they relate to the Bonner foster home and to Keena White and her family.

At the hearing on October 30, 1995, this court considered and denied cross Motions for Summary Judgment, concluding that disputes of material fact existed. The court also denied summary judgment to Department of Social Services defendants based upon their claim of qualified immunity.

Because the court is advised that defendants will appeal the ruling denying qualified immunity, it has drafted this memorandum Order in an effort to clarify the issues on appeal.

This court bases its denial of the qualified immunity defense urged by both state and county Department of Social Services defendants on the dual grounds that (1) during the time in question, there existed a constitutional right to protection on the part of those in the custody of the state, or having a special relationship with the state, so that defendants could have reasonably expected to know that a failure on their part to protect foster children placed by them in foster homes selected by them, or to properly train and supervise foster parents, could constitute a violation of plaintiffs' Fourteenth Amendment rights, and (2) since at least 1984, plaintiffs had a statutory right, pursuant to the South Carolina Child Protection Act, Sections 20-7-40, et seq., S.C. Code Ann., enforceable under 42 U.S.C. Section 1983, to the care and protection that they allege they were denied, such that defendants could not claim to exercise discretion in an area in which the law respecting their duties and

obligations was uncertain. See L.B. By and Through Darr v. Massinga, 838 F.2d 118, 122 (4th Cir. 1988); Compare Jenson v. Conrad, 747 F.2d 185 (4th Cir. 1984) (a case which did not involve foster care).

Pursuant to Harlow v. Fitzgerald, 457 U.S. 800 (1982), defendants' right to claim qualified immunity is determined by an objective test, rather that their subjective good faith belief. Thus, in denying qualified immunity to defendants, this court decides only that objectively defendants would not have been justified in doing, or in failing to do, what has been alleged. As the Court of Appeals recognized in Massinga, proof of the alleged nonfeasance and malfeasance "must await further proceedings." 838 F.2d at 1.

To recapitulate the decisions made by the court at the hearing, the court rules as follows:

(1) Plaintiffs' Motions for Summary Judgment and Partial Summary Judgment filed 9/1/95; 9/29/95; 10/10/95; 10/11/95 (3 Motions); 10/16/95 (2 Motions) are DENIED.

(2) Defendants' Motions for Summary Judgment and Partial Summary Judgment filed 9/13/95; 9/27/95; 10/13/95; 10/16/95 (2 Motions) are DENIED.

AND IT IS SO ORDERED.

/S/ CHARLES E. SIMONS, JR.
CHARLES E. SIMONS, JR.
SENIOR UNITED STATES DISTRICT JUDGE

Aiken, South Carolina
November 2, 1995

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
May 28, 1997

No. 95-3025
CA-93-3058-1-6

KEENA WHITE, by her Personal Representative Cindy White; CINDY WHITE, individually, and Cindy White as Guardian Ad Litem for Deidre Jones, Clifford White, Jr., Patrick White, Daniel White and Darren White,

Plaintiffs - Appellees

v.

RUBY CHAMBLIS

Defendant - Appellant

and

TINA WERTS; TANGA GILCHRIST; CLARENCE GRAHAM; CASSIE WILSON; MARIE DUNNAM; RAMONA FOLEY; BARRY DOWD; WILBERT LEWIS; JAMES C. SOLOMON, JR.; JOANNE SCHAEKEL; ANTHONY BONNER; GLADYS BONNER; TONY BONNER; AIKEN COUNTY DEPARTMENT OF SOCIAL SERVICES (ACDSS); DESIREE COUNCIL,

Defendants

No. 95-3078
CA-93-3058-1-6

KEENA WHITE, by her Personal Representative Cindy White;

CINDY WHITE, individually, and Cindy White as Guardian Ad Litem for Deidre Jones, Clifford White, Jr., Patrick White, Daniel White and Darren White,

Plaintiffs - Appellees

v.

TINA WERTS; TANGA GILCHRIST; CLARENCE GRAHAM; MARIE DUNNAM; RAMONA FOLEY; BARRY DOWD; WILBERT LEWIS; JAMES C. SOLOMON, JR.; JOANNE SCHAEKEL; DESIREE COUNCIL,

Defendants - Appellants

and

CASSIE WILSON; ANTHONY BONNER; GLADYS BONNER; TONY BONNER; AIKEN COUNTY DEPARTMENT OF SOCIAL SERVICES (ACDSS); RUBY CHAMBLISS

Defendants

No. 95-3088
CA-93-3058-1-6

KEENA WHITE, by her Personal Representative Cindy White; CINDY WHITE, individually, and Cindy White as Guardian Ad Litem for Deidre Jones, Clifford White, Jr., Patrick White, Daniel White and Darren White,

Plaintiffs - Appellees

v.

CASSIE WILSON

Defendant - Appellant

and

TINA WERTS; TANGA GILCHRIST; CLARENCE GRAHAM; MARIE DUNNAM; RAMONA FOLEY; BARRY DOWD; WILBERT LEWIS; JAMES C. SOLOMON, JR.; JOANNE SCHAEKEL; ANTHONY BONNER; GLADYS BONNER; TONY BONNER; AIKEN COUNTY DEPARTMENT OF SOCIAL SERVICES (ACDSS); DESIREE COUNCIL; RUBY CHAMBLISS

Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellees' petition for rehearing with suggestions for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

It is ordered that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court

/s/ Patricia S. Conner

CLERK

CONSTITUTIONAL PROVISIONS AND STATUTES

The Due Process Clause of the United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

§ 627. Foster care protection required for additional payments

(a) Requisite additional steps to qualify. If, for any fiscal year after fiscal year 1979, there is appropriated under section 420 [42 USCS § 620] a sum in excess of $141,000,000, a State shall not be eligible for payment from its allotment in an amount greater than the amount for which it would be eligible if such appropriation were equal to $141,000,000, unless such State---

(1) has conducted an inventory of all children who have been in foster care under the responsibility of the State for a period of six months preceding the inventory, and determined the appropriateness of, and necessity for, the current foster placement, whether the child can or should be returned to his parents or should be freed for adoption, and the services necessary to facilitate either the return of the child or the placement of the child for adoption or legal guardianship; and

(2) has implemented and is operating to the satisfaction of the Secretary--

(A) a statewide information system from which the status, demographic characteristics, location, and goals for the placement of every child in foster care or who has been in such care within the preceding twelve months can readily be determined;

(B) a case review system (as defined in section 475 (5) [42 USCS § 675 (5)]) for each child receiving foster care under

the supervision of the State; and
(C) a service program designed to help children, where appropriate, return to families from which they have been removed or be placed for adoption or legal guardianship.

§ 671. State plan for foster care and adoption assistance

(a) Requisite features of state plan. In order for a state to be eligible for payments under this part [42 USCS §§ 670 et seq.], it shall have a plan approved by the Secretary which---

(1) provides for foster care maintenance payments in accordance with section 472 [42 USCS § 672] and for adoption assistance payments in accordance with section 473 [42 USCS §673];
(2) provides that the State agency responsible for administering the program authorized by part B of this title [42 USC §§ 620 et seq.] shall administer, or supervise the administration of, the program authorized by this part [42 USC §§ 670 et seq.];
(3) provides that the plan shall be in effect in all political subdivisions of the State and, if administered by them, be mandatory upon them;
(4) provides that the State shall assure that the programs a the local level assisted under this part [42 USC §§670 et seq.] will be coordinated with the programs at the state or local level assisted under parts A and B of this title [42 USC §§ 601 et seq., 620 et seq.], under title XX of this Act [42 USC §§ 1397 et seq.], and under any other appropriate provision of Federal Law;
(5) provides that the State will, in the administration of its programs under this part [42 USCS §§ 670 et seq.], use such methods relating to the establishment and maintenance of personnel standards on a merit basis as are found by the Secretary to be necessary for the proper and efficient operation of the programs, except that the Secretary shall exercise no authority with respect ti the selection, tenure of office, or compensation of any individual employed in accordance with such methods;
(6) provides that the State agency referred to in paragraph (2) (hereinafter in this part [42 USCS §§670 et seq.] referred to as the "state agency") will make such reports, in such form and containing such information as the Secretary may from time to time require, and comply with such provisions as the Secretary may from time to time find necessary to assure the correctness and verification of such reports;
(7) provides that the State agency will monitor and conduct periodic

evaluations of activities carried out under this part [42 USCS §§ 670 et seq.];

(8) provides safeguards which restrict the use of or disclosure of information concerning individuals assisted under the State plan to purposes directly connected with (A) the administration of the plan of the State approved under this part [42 USCS §§ 670 et seq.], the plan or program of the state under part A, B, C, or D of this title [42 USCS §§ 601 et seq., 630 et seq., 1201 et seq., `35` et seq., 1381 et seq.] (as in effect in Puerto Rico, Guam, and the Virgin Islands), XIX, or XX [42 USC §§ 1396 et seq., 1397 et seq.], or the supplemental security income program established by title XVI [42 USCS §§ 1381 et seq.], (B) any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of any such plan or program, © the administration of any other Federal or federally assisted program which provides assistance, in cash or in kind, or services, directly to individuals on the basis of need, and (D) any audit or similar activity conducted in connection with the administration of any such plan or program by any governmental agency which is authorized by law to conduct such audit or activity; and the safeguards so provided shall prohibit disclosure, to any committee or legislative body (other than an agency referred to in clause (D) with respect to an activity referred to in such clause), of any information which identifies by name or address any such applicant or recipient; except that nothing contained herein shall preclude a State from providing standards which restrict disclosure to purposes more limited than those specified herein, or which, in the case of adoptions, prevent disclosure entirely;

(9) provides that where any agency of the State has reason to believe that the home or institution in which a child resides whose care is being paid for in whole or in part with funds provided under this part [42 USCS §§ 670 et seq.] is unsuitable for the child because of the neglect, abuse, or exploitation of such child, it shall bring such condition to the attention of the appropriate court or law enforcement agency.

(10) provides for the establishment or designation of a State authority or authorities which shall be responsible for establishing and maintaining standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes, including standards related to admission policies, safety, sanitation, and protection of civil rights, and provides

that the standards so established shall be applied by the State to any foster family home or child care institution receiving funds under this part [42 USCS §§ 670 et seq.] or part B of this title [42 USCS §§620 et seq.];

(11) provides for periodic review of the standards referred to in the preceding paragraph and amounts paid as foster care maintenance payments and adoption assistance payments to assure their continuing appropriateness;

(12) provides for granting an opportunity for a fair hearing before the State agency to any individual whose claim for benefits available pursuant to this part [42 USCS §§ 670 et seq.] is denied or is not acted upon with reasonable promptness;

(13) provides that he State shall arrange for a periodic and independently conducted audit of the programs assisted under this part [42 USCS §§670 et seq.] and part B of this title [42 USCS §§ 620 et seq.], which shall be conducted no less frequently than once every three years;

(14) provide (A) specific goals (which shall be established by State law on or before October 1, 1982) for each fiscal year (commencing with the fiscal year which begins on October 1, 1983) as to the maximum number of children (in absolute numbers or as a percentage of all children in foster care with respect to whom assistance under the plan is provided during such year) who, at any time during such year, will remain in foster care after having been in such care for a period in excess of twenty-four months, and (B) a description of the steps which will be taken by the State to achieve such goals;

(15) effective October 1, 1983, provides that , in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home;

(16) provides for the development of a case plan (as defined in section 475(1) [42 USCS § 675(1)] for each child receiving foster care maintenance payments under the State plan and provides for a case review system which meets the requirements described in section 475(5)(B) [42 USCS § 675(1)] for each child receiving foster care maintenance payments under the State plan and provides for a case review system which meets the requirements described in section 475(5)(B) [42 USCS § 675(B)] with respect to each such child; and

(17) provides that, where appropriate, all steps will be taken, including cooperative efforts with the State agencies administering the

plans approved under parts A and D [42 USCS §§ 601 et seq.], to secure an assignment to the State of any rights to support on behalf of each child receiving foster care maintenance payments under this part [42 USCS §§ 670 et seq.].

(b) Failure of State to comply with plan provisions. The Secretary shall approve any plan which complies with the provisions of subsection (a) of this section. However, in any case in which the secretary finds, after reasonable notice and opportunity for hearing, that a State plan which has been approved by the Secretary no longer complies with the provisions of subsection (a), or that in the administration of the plan there is a substantial failure to comply with the provisions of the plan, the Secretary shall notify the State that further payments will not be made to the State under this part [42 USCS §§670 et seq.] or that such payments will be made to the State but reduced by an amount which the Secretary determines appropriate, until the Secretary is satisfied that there is no longer any such failure to comply, and until he is so satisfied he shall make no further payments to the State or shall reduce such payments by the amount specified in his notification to the State.

§ 672. Foster care maintenance payments program

(a) Each State with a plan approved under this part [42 USCS §§ 670 et seq.] shall make foster care maintenance payments (as defined in section 475(4) [42 USCS § 675(4)] under this part [42 USCS §§ 670 et seq.] with respect to a child who would meet the requirements of section 406(a) [42 USCS § 606(a)] or of section 407 [42 USCS § 607] but for his removal from the home of a relative (specified in section 406(a) [42 USCS § 606(a)], if --

(1) the removal from the home was the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child and (effective October 1, 1983) that reasonable efforts of the type described in section 471(a)(15) [42 USCS § 671(a)(15)] have been made;

(2) such child's placement and care are the responsibility of (A) the State agency administering the State plan approved under section 471 [42 USCS § 671], or (B) any other public agency with whom the State agency administering or supervising the administration of the State plan approved under section 471 [42 USCS § 671] has made an agreement which is still in effect;

(3) such child has been placed in a foster family home or child-care institution as a result of a determination referred to in paragraph (1); and

(4) such child --

(A) received aid under the State plan approved under section 402 [42 USCS § 602} in or for the month in which court proceedings leading to the removal of such child from the home were initiated, or (B)(i) would have been made therefor, or (ii) had been living with a relative specified in section 406(a) [42 USCS § 606(a)] within six months prior to the month in which such proceedings were initiated, and would have received such aid in or for such month if in such month he had been living with such a relative and application therefor had been made.

(b) Foster care maintenance payments may be made under this part [42 USCS § 670 et seq.] only on behalf of a child described in subsection (a) of this section who is --

(1) in the foster family home of an individual , whether the payments therefor are made to such individual or to a public or nonprofit private child-placement or child-agency, or

(2) in a child-care institution, whether the payments therefor are made to such institution or to a public or nonprofit private child-placement or child-care agency, which payments shall be limited so as to include in such payments only those items which are included in the term "foster care maintenance payments" (as defined in section 475(4) [42 USCS § 675(4)]).

(c) For the purposes of this part 42 USCS § 670 et seq.], (1) the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State having responsibility for licensing homes of this type, as meeting the standards established for such licensing; and (2) the term "child-care institution" means a nonprofit private child-care institution, or a public child-care institution which accommodates no more than twenty-five children, which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing, bu the term shall not include detention facilities, forestry camps, training schools, or any other facility operated primarily for the detention of children who are determined delinquent.

(d) For purposes of titles XIX and XX [42 USCS §§ 1396 et seq., 1397 et seq.], any child with respect to whom foster care maintenance payments are

made under this section shall be deemed to be a dependent child as defined in section 406 [42 USCS § 606] and shall be deemed to be a recipient of aid to families with dependent children under part A of this title [42 USCS §§ 601 et seq.]

Supreme Court, U.S.
FILED
SEP 4 1997
CLERK

No. 97-204

In The

Supreme Court of the United States

October Term, 1996

KEENA WHITE, by her Personal Representative, CINDY WHITE, CINDY WHITE, Individually, and CINDY WHITE, as Guardian ad Litem for DEIDRE JONES, CLIFFORD WHITE, JR., PATRIC WHITE, DANIEL WHITE and DARREN WHITE,

Petitioners,

vs.

RUBY CHAMBLISS; TINA WERTS; TANGA GILCHRIST; CLARENCE GRAHAM; CASSIE WILSON; MARIE DUNNAM; RAMONA FOLEY; BARRY DOWD; WILBERT LEWIS; JAMES C. SOLOMON, JR.; JOANNE SCHAEKEL; DESIREE COUNCIL,

Respondents,

-and-

ANTHONY BONNER, GLADYS BONNER and TONY BONNER,

Defendants.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Did the Fourth Circuit correctly conclude, in light of controlling Fourth Circuit precedent and the lack of Supreme Court authority, that no clearly established right to affirmative state protection exists for children placed in foster care?

II. Did the Fourth Circuit correctly conclude that the Adoption Assistance and Child Welfare Act of 1980 could not form the basis of petitioners' 42 U.S.C. § 1983 claim?

III. Did the Fourth Circuit correctly conclude that the South Carolina Child Protection Act does not create federal constitutional guarantees?

LIST OF ALL PARTIES

Petitioners' list of parties is correct with the exception of the spelling of Ruby Chambliss.

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OPINIONS BELOW

The Fourth Circuit's decision in *White v. Chambliss* is reported at 112 F.3d 731 (4th Cir. 1997), and is set forth in the Appendix filed by the petitioners at 1a. The Fourth Circuit's denial of the Petition for Rehearing with Suggestion for Rehearing In Banc is set forth in the Appendix at 19a. Finally, the district court's written order from which the respondents appealed is set forth in the Appendix at 16a.

FEDERAL STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners identify the Fourteenth Amendment to the Constitution and 42 U.S.C. § 1983, which are set forth in the Appendix at 22a. Petitioners identify "42 U.S.C. § 671, *et seq.*" as a federal statute involved, but the Appendix only sets forth §§ 671 and 672, which are the only provisions relied upon in the petition. Petitioners also identify 42 U.S.C. § 1320a-2, which is not set forth in the Appendix, and therefore, is set forth below:

> In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in Suter v. Artist M., 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not

> intended to alter the holding in Suter v. Artist M. that section 671(a)(15) of this title is not enforceable in a private right of action.

Finally, petitioners set forth "§ 627" in the Appendix, but do not identify it in the petition as a federal statute involved in the case.

STATEMENT OF THE CASE

This action arose out of the alleged wrongful death of Keena White, a minor child, while she was in foster care. The petitioners, who were plaintiffs/appellees below, are Cindy White and her living children. The Respondents, who were defendants/appellants below, are various employees of the South Carolina Department of Social Services ("DSS").

The petitioners' Brief Summary of the Facts, Detailed Factual Summary, and Argument contain numerous misstatements of fact in that there is either no support for such misstatements in the record below, or the facts as alleged by the petitioners were not discovered until 1993, many months *after* the death of Keena White, which occurred in January, 1992.[1] A correct statement of facts, supported by the record below, follows:

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1. Petitioners make the following misstatements: that DSS failed to properly license, train, or monitor the foster homes, petition at 2 & throughout; that the Sheriff's Department refused to remove the White children, *id.* at 2-3; that DSS failed to supervise their placements and visit the homes, *id.* at 3; that DSS abandoned six helpless children, *id.*; that Keena had untreated illnesses and injuries while in foster care, *id.*; that the Bonner foster home was not properly licensed and was abusive, *id.* at 3-4; that all White children were abused in their respective foster homes, *id.* at 4; that Ms. White reported abuse of her children to four caseworkers on three occasions, *id.*; that State Senator Moore asked Carol Heyes to speak to caseworkers regarding the White children's alleged abuse in foster care, *id.* at 5; that government studies

(Cont'd)

On November 20, 1991, shortly before midnight, Ms. White took her son, Daniel, to the University Hospital in Augusta, Georgia with a broken arm. After examining Daniel, the physicians diagnosed his condition as a fractured "spiral" humerus of the left arm. As a result, the physicians suspected child abuse because a spiral fracture is a very strong indicator of child abuse. The hospital staff then contacted the Aiken County Sheriff's Department which in turn relayed the information to the Aiken County office of DSS. A nurse at the hospital contacted Tanga Gilchrist, an Aiken County DSS caseworker, and reported to her that they had a child who they suspected was a victim of abuse.

After receiving the telephone call, Ms. Gilchrist proceeded to the University Hospital to investigate the situation and make a report. When questioned as to how the injury occurred, Ms. White could offer no believable or even plausible explanation. Although Ms. White claimed she was not in the room when Daniel broke his arm, she speculated he might have fallen out of his bed and caught his arm in the bed slats. Investigating further, Ms. Gilchrist learned from the treating physician that it was "very unlikely" such a spiral fracture could have been sustained from a fall or falling out of a bed. The doctor opined that the child needed to be in the custody of DSS and agreed to hold the child until DSS could take action. Ms. Gilchrist also

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(Cont'd)

revealed long-standing deficiencies in foster care, *id.*; that the DSS defendants admit the White children were in state custody, *id.* at 13-14; that the DSS defendants placed Keena in a dangerous, unsupervised foster home, *id.* at 16; that the DSS defendants knew of willful violations of state law and procedure prior to Keena's death, *id.* at 16-17; that the DSS defendants failed to visit and provide medical care to the White children while in foster care, *id.* at 17; that the DSS defendants knew of violations of state law, policy, or procedure involving the Bonner foster home prior to Keena's death, *id.* at 19; and that DSS or the DSS defendants knew its policies were causing children to die in foster care, *id.* at 20.

consulted with another physician, an orthopedist, who confirmed the opinions given by the first doctor.

On November 22, 1991, Ms. Gilchrist went to Ms. White's home in order to personally view and examine the bed from which Daniel had supposedly fallen. Ms. Gilchrist personally tested the theory that Daniel could possibly have gotten his arm caught between the slats in the bed or fallen out of the bed and concluded that Ms. White's theory was unbelievable because Ms. Gilchrist has a larger arm than Daniel and her arm did not get caught between the slats. Ms. Gilchrist also noted that the bed was less than one foot from the floor. That same day, Ms. Gilchrist and her supervisor, Ruby Chambliss, determined that an *ex parte* petition for custody of Ms. White's children should be submitted to the Family Court for Aiken County.

On November 26, 1991, DSS filed the petition for emergency protective custody and the petition for removal in Aiken County Family Court. The judge signed the *ex parte* order granting emergency protective custody to Aiken County DSS on November 26, 1991, and DSS received the order on December 3, 1991. The court order stated that probable cause existed to believe that, by reason of abuse and/or neglect, there is a threat to the life and physical safety of Daniel, Darren, Deidre, Clifford, Patric, and Keena, who were in the custody of Ms. White, and that DSS should have temporary custody. The same day DSS received the order, Ms. Gilchrist and another caseworker accompanied Aiken County Sheriff's Department personnel to Ms. White's trailer and took custody of her children as directed by the court order. When they arrived, the children had soiled diapers, wore dirty clothes, smelled terrible, and the house was filthy dirty and smelled of feces.

A probable cause hearing was held the day after the removal, which Ms. White attended, and the court found probable cause

existed for the minor children to be taken into emergency protective custody which had been effected on December 3, 1991. The court further concluded that it would be contrary to the best interests of the minor children to return them to Ms. White in view of the *prima facie* evidence of physical abuse to Daniel White. The court ruled that custody of all children should remain with DSS pending a merits hearing, but allowed Ms. White supervised visitation with her children in the meantime. The White children were placed in various foster homes, with Keena going to the home of Anthony and Gladys Bonner, whose foster home had previously been licensed.

During the weeks between the December 4 probable cause hearing and the scheduled merits hearing, Ms. White was allowed supervised visitation with her children. Ms. White alleged that during these visits, she noticed bruises and scratches on her children and that she relayed her concerns to a DSS caseworker. Ms. White subsequently wrote a letter to Senator Strom Thurmond seeking return of her children and expressing her concerns regarding the alleged bruises and scratches. Senator Thurmond wrote DSS on December 20 on Ms. White's behalf. Cassie Wilson, who was director of Human Services at Aiken County DSS, testified that Ms. White told her the children routinely sustained injuries from normal play activity and fighting. Ms. Wilson further testified that when the children were removed from Ms. White's home, they had various bruises, scratches, and other injuries on them. Tina Werts, who was Aiken County DSS' foster care worker, testified that she took Keena White to the doctor for a cold around January 3, 1992, and that Keena was in good condition on that day. Thus, DSS concluded that the children's injuries were either present when the children were taken into custody or were sustained during normal child play.

On January 18, 1992, approximately six (6) weeks after being placed with the Bonners, Keena died, apparently of blows

to the head, while in the Bonners' care. The forensic pathologist stated that her death was "best classified as a homicide." Because law enforcement officials were unable to determine who struck Keena, no criminal charges were filed. DSS removed all foster children from the Bonners' home and placed no other children in their home after Keena's death. Following an investigation into Keena's death, DSS revoked the Bonners' foster care license.

At the merits hearing on January 24, 1992, counsel for the respective parties submitted a settlement agreement in which Ms. White acknowledged that Daniel White had been physically abused by an "unknown" perpetrator when he received the spiral fracture at his home. DSS returned both legal and physical custody of the minor children to Ms. White on the condition that she receive a psychological evaluation, including observation of the family unit, at the expense of DSS. Ms. White also agreed to several other specified conditions with which she was to comply and DSS was to monitor. Ms. White freely and voluntarily entered into the agreement outlined in the order mentioned above, agreed it was fair and equitable and in the best interests of the minor children, and asked that it be approved and made the order of the court.

Ms. White filed suit on November 18, 1993, as personal representative of the estate of Keena for her alleged wrongful death, pain and suffering, and for alleged violations of Keena's due process rights. Ms. White also sued as guardian *ad litem* for her other five (5) children for alleged violations of both their due process rights and her own due process rights. Ms. White named the respondents as defendants in the suit along with the Bonners. The respondents are referred to collectively as "the DSS defendants" throughout the brief.

After extensive discovery, the respondents filed motions for summary judgment based, in part, on the grounds of qualified

immunity. The district court denied the motions, and the DSS defendants appealed. On appeal, the United States Court of Appeals for the Fourth Circuit reversed the district court, finding that the DSS defendants were entitled to qualified immunity.

REASONS FOR DENYING THE WRIT

I.

DID THE FOURTH CIRCUIT CORRECTLY CONCLUDE, IN LIGHT OF CONTROLLING FOURTH CIRCUIT PRECEDENT AND THE LACK OF SUPREME COURT AUTHORITY, THAT NO CLEARLY ESTABLISHED RIGHT TO AFFIRMATIVE STATE PROTECTION EXISTS FOR CHILDREN PLACED IN FOSTER CARE?

A. Did The Fourth Circuit Correctly Conclude That No Affirmative Duty Of Protection Was "Clearly Established" At The Time Of The Events In Question?

> [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). According to Fourth Circuit precedent, a right is not clearly established unless the right has been recognized by the highest court in the state where the case arose, by the appropriate United States Court of Appeals, or by the Supreme Court. *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980), *cert. denied*, 451 U.S. 969 (1981).

Further, "[t]he contours of the right [allegedly violated] must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). This qualified immunity from suit under § 1983 protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In 1989, more than two years prior to the events giving rise to the present case, binding Fourth Circuit precedent clearly established that state officials owe no duty to protect children in foster care. *Milburn v. Anne Arundel County Dep't of Social Serv.*, 871 F.2d 474 (4th Cir.), *cert. denied*, 493 U.S. 850 (1989). Therefore, the plaintiffs could hardly argue that the DSS defendants violated a clearly established affirmative duty to protect the children while they were in foster care because the law specifically provided to the contrary. In *Milburn*, the Fourth Circuit held that foster parents are not state actors for purposes of § 1983. The court reasoned that the state is not responsible for the alleged abuse; it exercised no coercive power over the foster parents; it did not encourage them; and the care of foster children is not traditionally the exclusive prerogative of the state. The court concluded that the unfortunate abuse at the hands of the foster parents did not make the foster parents state actors, and it did not make those who might have intervened liable under § 1983. *Id.* at 479, *cited with approval in*, *United Auto Workers v. Gaston Festivals, Inc.*, 43 F.3d 902, 907 (4th Cir. 1995) (" 'care of foster children' not considered traditionally and exclusively a governmental function"); *Andrews v. Federal Home Loan Bank*, 998 F.2d 214, 220 (4th Cir. 1993) ("child abuse by foster parents not state action when state failed to intervene to protect child"); *Weller v. Department of Social Serv.*, 901 F.2d 387, 392 (4th Cir. 1990) ("We recently held that harm suffered by a child at the hands of his foster parents is not harm inflicted by state

agents.").[2] Additionally, the South Carolina Supreme Court held in 1991 that foster parents are mere licensees, and not employees or even independent contractors for DSS. *Simmons v. Robinson*, 409 S.E. 2d 381, 383 (S. C. 1991).

In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), this Court held that the state and its officials do not owe children an affirmative duty of protection against private violence. Even though the state was aware of the suspected abuse and undertook to protect the child in *DeShaney*, the state did not have an affirmative constitutional duty to provide protection because the child was not in state custody, and the harm was not inflicted by a state actor. *DeShaney*, 489 U.S. at 201. Although this Court in *DeShaney* specifically left open the question of whether foster care constitutes the type of custodial relationship which gives rise to an affirmative duty of protection,[3] *id.* at 201 n.9, the Fourth Circuit subsequently decided the issue in *Milburn*. Applying *DeShaney*, the Fourth Circuit concluded that because foster care is not state custody and foster parents are not state actors, children placed in foster care have no federal constitutional right to protection by the state.

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2. As the Fourth Circuit noted below, petitioners' claim that the method of placement in foster care distinguished *Milburn* from the present cases is misguided. The Fourth Circuit did not discuss the nature of the placement as part of its reasoning in *Milburn*. Further, the foster parents in *Milburn* had a contract with the state in which the state was obligated to license the foster home; supervise placement of the child in the home; and provide board, medical care, clothing and supervision of the child during placement. The state shoulders the same responsibilities (*i.e.*, licensing, supervision, basic necessities, etc.) regardless of how the child came to be placed in foster care. "Nothing in *Milburn* limited its application to situations where parents had voluntarily placed their children in foster care, and *Milburn* was not interpreted as being so limited in subsequent Fourth Circuit cases." Appendix at 12a.

3. Petitioners' statement that "*DeShaney* recognized foster care as state custody," petition at 10, clearly misstates this Court's holding in *DeShaney*.

When the events giving rise to the instant case began in late 1991, the Fourth Circuit had squarely held that the state owes no affirmative duty to protect children in foster care. Therefore, the Fourth Circuit properly concluded that the DSS defendants were entitled to qualified immunity because no "right to affirmative state protection for children placed in foster care was clearly established at the time of Keena's death." Appendix at 12a. Even if this Court were to conclude that foster parents are state actors, the DSS defendants would still be entitled to qualified immunity because the issue was not clearly established at the time of these events.

B. Did The Fourth Circuit Correctly Conclude That Foster Parents Are Not State Actors?

Petitioners seeks to hold the DSS defendants liable under 42 U.S.C. § 1983 for the harm suffered by Keena White while under the Bonners' care. In order for petitioners to show that the alleged constitutional deprivation was under color of state law as required by § 1983, petitioners must prove the existence of state action. *United States v. Price*, 383 U.S. 787, 794 n.7 (1966). In determining whether a private party falls within the scope of § 1983 as a state actor, the plaintiff must demonstrate the following three factors: (1) that a sufficiently close nexus exists between the state and the challenged action in order that the action of the actor might fairly be treated as that of the state, and regulation alone is not enough; (2) that the state has exercised coercive power or such significant encouragement that the actor's choice must be deemed that of the state; and (3) that "the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.' " *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)).

In determining whether the foster parents are state actors and whether foster care is state custody, the Fourth Circuit in

Milburn reviewed and applied this Court's decisions in *Jackson*, *Blum*, and *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). In *Jackson*, this Court held that a utility company was not a state actor for purposes of § 1983 despite the extensive and detailed regulation of the company by the state. *Jackson*, 419 U.S. at 350, 358. In *Blum*, this Court held that state action is not present when nursing homes decide to discharge or transfer Medicaid patients even though the state subsidized the cost of the nursing homes, the state paid more than 90% of the patients' medical expenses in the homes, and the state licensed the homes. *Blum*, 457 U.S. at 1011-12. In *Rendell-Baker*, this Court held that a private school, which derived most of its income from the state and was regulated by the state, was not a state actor. *Rendell-Baker*, 457 U.S. at 839-43.

Applying this Court's precedent, the Fourth Circuit correctly concluded in *Milburn* that foster care is not state custody, and foster parents are not state actors. The Fourth Circuit reasoned that the state is not responsible for the alleged abuse; it exercised no coercive power over the foster parents; it did not encourage them; and the care of foster children is not traditionally the exclusive prerogative of the state. The court concluded that the unfortunate abuse at the hands of the foster parents did not make the foster parents state actors, and it did not make those who might have intervened liable under § 1983. *Milburn*, 871 F.2d at 479. Just as in *Jackson* and *Rendell-Baker*, the regulation of foster homes by the state does not render the foster parents state actors. Further, just as in *Blum*, the subsidy and licensing provided to the foster parents by the state does not render the foster parents state actors.

> The functions considered to fall traditionally within the exclusive prerogative of the state comprise a very narrow category, subject to "carefully confined bounds." The

Supreme Court has identified as functions "traditionally exclusively reserved to the State," only the administration of elections, the operation of a company town, eminent domain, peremptory challenges in jury selection, and, in at least limited circumstances, the operation of a municipal park.

The narrowness of this category is illustrated further by the functions that the Court has held do *not* fall traditionally within the exclusive prerogative of the state. These include the provision of electricity and other utilities, the operation of nursing homes, and the coordination and governance of college and amateur athletics. The Court has held that schooling for maladjusted children does not qualify as a traditional and exclusive state function. It has also noted that the provision of education does not render a private school's administrators state actors, even though "[i]t is difficult to imagine a regulated activity more essential or more 'clothed with the public interest' than the maintenance of schools." *See also Milburn v. Anne Arundel County Dep't of Social Servs.*, 871 F.2d 474, 479 (4th Cir.), *cert. denied*, 493 U.S. 850, 110 S. Ct. 148, 107 L.Ed.2d 106 (1989) ("care of foster children" not considered traditionally and exclusively a governmental function.)

Together these cases confirm that only those undertakings that are uniquely

> sovereign in character qualify as traditional and exclusive state functions. As the Court has observed, "[w]hile many functions have been traditionally preformed by governments, very few have been 'exclusively reserved to the State.' "

United Auto Workers, 43 F.3d at 907 (citations omitted).

Constitutional standards are invoked only when the state is *responsible* for the specific conduct of which the plaintiffs complain, *Milburn*, 871 F.2d at 478, and in the present case, the Bonners, not the state, are responsible for any alleged abuse. As properly noted by the Fourth Circuit below, the record contains no evidence that the DSS defendants knew or suspected that the Bonners were abusive foster parents, or that the Bonners had ever been accused of or investigated for child abuse. Appendix at 10a. Further, the Bonners were licensed foster care workers. *Id.* Thus, the DSS defendants are not responsible for the unfortunate abuse Keena suffered while under the Bonners' care which they could not have known would occur.[4]

Petitioners rely upon *West v. Atkins*, 487 U.S. 42 (1988), as support for their contention that foster parents are state actors. In *West*, this Court held that a physician who provided medical services to a prisoner at the state's request was a state actor for purposes of § 1983. *West* is distinguishable from the present case because this Court's reasoning in *West* stemmed from the state's affirmative duty to provide medical care to prisoners as

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4. Petitioners' quote from this Court's decision in *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977), sheds no light on whether foster parents are state actors and whether foster care is state custody. In *Smith*, this Court examined foster care in determining whether foster parents enjoy procedural due process rights to notice and a hearing prior to removal of the foster child.

recognized in *Estelle v. Gamble*, 429 U.S. 97 (1976). All medical services provided to prisoners are quite obviously state action under § 1983 because incarceration is the *exclusive* prerogative of the state, one of the required elements for finding state action under *Blum* and *Jackson*. To the contrary, no such affirmative duty exists in the foster care context; and therefore, the basis for finding state action in *West* is lacking in foster care.

Petitioners also erroneously rely upon *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), in which this Court held that state action exists when a restaurant that leases public property from the state racially discriminates in violation of the Fourteenth Amendment. *Burton* has no bearing on the present case because this Court explicitly limited the holding to cases in which the actor leases public property from the state and fails to comply with the proscriptions of the Fourteenth Amendment. *Burton*, 365 U.S. at 726.

Finally, petitioners erroneously refuse to acknowledge the application of *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) to the present case. In *Moose Lodge No. 107*, this Court held that racial discrimination of a private club does not constitute state action merely because the club receives a liquor license from the state and is subject to state liquor licensing regulations. This Court reasoned: "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination." *Id.* at 176-77. Likewise, foster parents are not state actors simply because the state regulates them and provides them a license. The Fourth Circuit followed the same reasoning expressed by this Court in *Moose Lodge No. 107* when it held that the state did not coerce or encourage the abuse by the foster parents, and thus, the foster parents did not act on behalf of the state. *Milburn*, 871 F.2d at 479.

Applying this Court's precedent in the foster care context compels the conclusion that the Fourth Circuit properly held in *Milburn*, and in the instant case below, that foster parents are not state actors and foster care is not state custody.

C. Applying The Decisions Of Other United States Courts Of Appeals Does Not Compel A Different Conclusion In This Case.

Petitioners cite cases from other circuits as the basis for their contention that the Fourth Circuit erred in finding that the DSS defendants were entitled to qualified immunity. *Norfleet v. Arkansas Dep't of Human Serv.*, 989 F.2d 289 (8th Cir. 1993); *Yvonne L. v. New Mexico Dep't of Human Serv.*, 959 F.2d 883 (10th Cir. 1992); *K.H. v. Morgan*, 914 F.2d 846 (7th Cir. 1990); *Meador v. Cabinet for Human Resources*, 902 F.2d 474 (6th Cir.), *cert. denied*, 498 U.S. 867 (1990); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989); and *Doe v. New York City Dep't of Social Serv.*, 709 F.2d 782 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983).

Contrary to petitioners' assertion, the Fourth Circuit did not ignore the existence of cases from other United States Courts of Appeals. The Fourth Circuit expressly recognized the existence of the cases from the other circuits, but then properly held:

> Whatever the clearly established law on this question, White's claim simply falls short on the facts. The summary judgment record contains no evidence to indicate that any of the DSS defendants knew or suspected that the Bonners were abusive foster parents when they placed Keena in their care. Indeed, the Bonners were licensed by the DSS, and

> White points to no evidence indicating that the Bonners had previously been accused of, or investigated for, child abuse. A claim of deliberate indifference, unlike one of negligence, implies at a minimum that defendants were plainly placed on notice of a danger and chose to ignore the danger notwithstanding the notice. There is simply no evidence that the DSS defendants were on notice of any problem at the time the placement decision was made.

Appendix at 10a. Additionally, although Ms. White alleged that she noticed bruises and scratches on her children during the December 9 supervised visit, the Fourth Circuit noted:

> Cassie Wilson, one of the caseworkers on the White case, testified that White had told her that the children routinely sustained minor injuries due to playing or fighting with one another Furthermore, Tina Werts, another caseworker, testified that she had taken Keena to the doctor with a cold on January 3, and that Keena had appeared to be in good condition on that date. DSS thus concluded that any alleged injuries were the "results of natural child play."

Appendix at 6a.

Although cases from other circuits have held that officials may be held liable for placing minor children in foster care where they suffered abuse, the Fourth Circuit noted that this case "simply falls short on the facts." Thus, even if the Fourth Circuit had followed those cases, its conclusion would have been the

same; and therefore, in that regard, its conclusion does not conflict with the decisions of other circuits.

The petitioners assert that the Bonners "had physically abused other foster children by hitting, slapping, locking in closets, and cursing them." Petition at 2. They also assert that the Bonners' adult son "had previously hit foster children in the head with his knuckles." *Id.* The petitioners again make similar allegations regarding abuse in the Bonner home on page 4 of their brief. However, the petitioners fail to inform the Court that they derive all of these allegations from an Investigative Matrix dated May 24, *1993* and a Determination Fact Sheet dated May 28, *1993* — more than a year *after* Keena's death. Thus, none of these factual allegations properly supports a claim that the DSS defendants knew or should have known that the Bonner home was unsafe either before placement or during placement.

Therefore, the Fourth Circuit properly concluded that the DSS defendants were entitled to qualified immunity for their conduct relating to Keena's placement in the Bonners' home.

II.

DID THE FOURTH CIRCUIT CORRECTLY CONCLUDE THAT THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT COULD NOT FORM THE BASIS OF PETITIONERS' 42 U.S.C. § 1983 CLAIM?

First and foremost, the petitioners' argument that the Adoption Assistance and Child Welfare Act ("AACWA"), 42 U.S.C. §§ 620-628, 670-679a, clearly established rights in the present case is not properly before this Court. Petitioners sought for the first time on appeal to the Fourth Circuit to claim the AACWA as the basis for their § 1983 claim. Prior to the appeal, petitioners alleged federal constitutional violations as the basis for their § 1983 claim. Both the headings of the amended

complaint and the statement of issues presented to the Fourth Circuit assert violations of federal constitutional rights, and not federal statutory rights. The only mention of the AACWA in the amended complaint appears on page 18 under the first cause of action for denial of *procedural* due process; yet the petitioners argued on appeal to the Fourth Circuit and currently argue that the AACWA clearly established substantive due process rights. In this sole mention of the AACWA, the amended complaint fails to even identify what provisions, if any, the DSS defendants allegedly violated. The amended complaint never mentions the AACWA under the causes of action for alleged denials of substantive due process rights. The Petition states for the first time ever in this case the specific provisions of the AACWA upon which the petitioners now seek to apply. Petition at 21. In their brief to the Fourth Circuit, petitioners merely referenced language from the AACWA, and from this language, the Fourth Circuit apparently gleaned that they intended to state a violation of § 671(a)(10).[5] Because the petitioners never identified to the Fourth Circuit any of the provisions which they now assert to this Court, the Fourth Circuit never had an opportunity to consider §§ 671(a)(7), 671(a)(16), or 672(c), and the Fourth Circuit was required to make assumptions regarding § 671(a)(10) as the basis for the claim. This Court should not allow the petitioners to wait until an appeal to assert a new ground as the basis for a § 1983 claim.

Even if provisions of the AACWA were properly before this Court, the Fourth Circuit correctly held that petitioners could not state a § 1983 claim arising out of alleged violations of the AACWA. In *Suter v. Artist M.*, 503 U.S. 347, 350 (1992), this Court was called upon to determine:

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5. At page 20 of petitioners' brief to the Fourth Circuit, they discuss requirements of the AACWA and cite to 42 U.S.C. § 608. The requirements discussed are those found in § 671(a)(10), not § 608; and thus, the Fourth Circuit must have concluded that petitioners intended to cite § 671(a)(10).

> whether private individuals have the right to enforce by suit a provision of the Adoption Assistance and Child Welfare Act of 1980 . . . , either under the Act itself or through an action under 42 U.S.C. § 1983.

This Court concluded that § 671 of the AACWA did not create enforceable rights under § 1983.

As noted by the Fourth Circuit below, this Court determined in *Suter* that § 671(a)(15) did not create privately enforceable rights because:

> (1) the section did not state a clear requirement of any conditions on state receipt of federal grants, *id.* at 356-57; (2) the statute did not include any "statutory guidance . . . as to how 'reasonable efforts' are to be measured," *id.* at 360; and (3) section 42 U.S.C. § 671(b) provided for the establishment of an alternative enforcement mechanism, *id.* at 360-61.

Appendix at 14a. The Fourth Circuit properly found that § 671(a)(10) is likewise not privately enforceable because (1) the provision is no more specific than § 671(a)(15); (2) the AACWA provides no statutory guidance to clarify the meaning of § 671(a)(10)'s requirements; and (3) the Secretary of Health and Human Services is vested with jurisdiction to redress violations of the AACWA. *Id.*

In addition to § 671(a)(10), petitioners assert, for the first time, §§ 671(a)(7), 671(a)(16), and 672(c) as the basis for their § 1983 claim. However, for the same reasons recited by this Court in *Suter*, and by the Fourth Circuit below, none of these

provisions of the AACWA is privately enforceable under § 1983. First, this Court noted in *Suter*, in reference to § 671(a)(9), that because "this subsection is merely another feature which the state plan must include to be approved by the Secretary, it does not afford a cause of action to the respondents anymore than does the 'reasonable efforts' clause of § 671(a)(15)." *Suter*, 503 U.S. at 359 n.10. The Court earlier noted that § 671(a) merely requires the state to "have a plan approved by the Secretary" which contains the listed features, and it does not create privately enforceable rights regarding the commitments contained in those plan. *Id.* at 358. For the same reasons this Court in *Suter* found that § 671(a)(15) did not create privately enforceable rights, §§ 671(a)(7) and 671(a)(16) likewise do not create privately enforceable rights. Thus, none of the subsections of § 671(a) is privately enforceable. Second, § 672(c) is not privately enforceable because it provides nothing more than the definition of a "foster family home," for purposes of the AACWA, and further, it leaves the states with discretion in determining the licensing requirements of a foster home. To conclude that § 672(c) is privately enforceable under § 1983 would render the federal courts the enforcers of each state's licensing requirements. As part of its reasoning in *Suter* that § 671(a) did not create a private right of action, this Court noted that "[h]ow the State was to comply with this directive, and with the other provisions of the Act, was, within broad limits, left up to the State." *Id.* at 360. Likewise, the licensing requirements for a "foster family home" are left up to the State.

Following *Suter*, Congress enacted 42 U.S.C § 1320a-2 which modified *Suter only* to the extent that *Suter* changed prior Supreme Court precedent. The enactment specifically stated that it was not intended to alter the holding in *Suter* that § 671(a)(15) of the AACWA is not privately enforceable. In *LaShawn v. Barry*, the D.C. Circuit held that § 1320a-2 did not modify *Suter* at all because *Suter* did not change pre-existing Supreme Court

precedent. 69 F.3d 556 (D.C. Cir. 1995), *vacated on procedural grounds*, 87 F.3d 1389 (D.C. Cir. 1996). Several other United States Courts of Appeals have cited *Suter* with approval after the date of § 1320a-2's enactment, October of 1994. *Tony L. v. Childers*, 71 F.3d 1182 (6th Cir. 1995) (*Suter* did not alter prior Supreme Court precedent), *cert. denied*, 116 S. Ct. 1834 (1996); *Freestone v. Cowan*, 68 F.3d 1141 (9th Cir. 1995) (*Suter* represents merely an elaboration and amplification of prior Supreme Court precedent, not a departure or a change), *vacated on other grounds sub nom. Blessing v. Freestone*, 117 S. Ct. 1353 (1997); *City of Chicago v. Lindley*, 66 F.3d 819 (7th Cir. 1995) (citing *Suter* together with prior Supreme Court precedent); *Little Rock Family Planning Serv. v. Dalton*, 60 F.3d 497 (8th Cir. 1995) (*Suter* did not overrule prior Supreme Court precedent), *cert. granted, in part & rev'd in part on other grounds*, 116 S. Ct. 1063 (1996). The Fourth Circuit correctly held that the congressional enactment did not alter *Suter* because "*Suter* itself was not a novel holding, but rather rested upon settled legal principles with regard to private rights of action in the context of the AACWA." Appendix at 14a. The petitioners maintain that § 1320a-2 requires this Court to "revert back to the analysis" set forth by this Court in *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990) and *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987). However, petitioners fail to recognize that in *Suter* this Court followed both *Wilder* and *Wright* as well as *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981) and *Maine v. Thiboutot*, 448 U.S. 1 (1980). Therefore, *Suter* did not change pre-existing law; rather, it followed pre-existing law.[6]

Consequently, the Fourth Circuit correctly concluded that

6. Petitioners' statement that the decision below is in conflict with decisions of the Southern District of New York and Eastern District of Wisconsin is, of course, not grounds for a petition for a writ of certiorari. S. Ct. R. 10(a).

the AACWA does not create rights enforceable under § 1983 in the present case.

III.

DID THE FOURTH CIRCUIT CORRECTLY CONCLUDE THAT THE SOUTH CAROLINA CHILD PROTECTION ACT DOES NOT CREATE CONSTITUTIONAL GUARANTEES?

In the amended complaint, petitioners asserted violations of their procedural due process rights stemming from the DSS defendants' alleged failure to give notice and a hearing prior to the removal and their alleged failure to adequately investigate. In their brief to the Fourth Circuit, however, petitioners only addressed the alleged failure to conduct an adequate investigation. Brief of Appellees at 37-38. In their brief to this Court, petitioners allege that the South Carolina Child Protection Act ("Child Protection Act" or "Act") created a protected property interest in an adequate investigation and in protection by the state in accordance with the Act.

The Fourth Circuit did not fail to address petitioners' procedural due process claims as the petitioners state in heading III. Petition at 24. In fact, the Fourth Circuit specifically addressed these claims and concluded that the DSS defendants did not deny them procedural due process. Appendix at 9a. The Fourth Circuit held:

> White also contends that she and her children were denied procedural due process. We disagree. The Fourteenth Amendment interest that White possesses runs to court proceedings provided under state law and not to the discretionary discharge by DSS of its

> duties. *Weller*, 901 F.2d at 392. As to those court procedures, we have noted that "the requirements of process may be delayed where emergency action is necessary to avert imminent harm to a child." [*Jordan v. Jackson*, 15 F.3d 333, 343 (4th Cir. 1994)]; *Weller*, 901 F.2d at 393. In this case, DSS sought a judicially approved *ex parte* order before removing the White children. Furthermore, a full hearing was held within twenty-four hours of the removal. DSS therefore fully complied with this circuit's directive that such a hearing should be held soon after an emergency removal. *Jordan*, 15 F.3d at 351. In *Jordan*, we approved a hearing which was held some 65 hours after a child was removed from his home. Perforce, the much prompter hearing held in this case cannot be judged constitutionally invalid. Under these circumstances, we cannot conclude that White was denied the process she was due.

Appendix at 9a (footnote omitted).

In *Weller*, the Fourth Circuit correctly held:

> If Weller is seeking compliance with state law, this is not the proper forum. Even if BCDSS did violate state law, it is well settled that violations of state law cannot provide the basis of a due process claim. Weller has no property or liberty interest in the specific investigative procedures which he contends were neglected; therefore no due process claim can rest upon the state's failure to conduct them.

Weller, 901 F.2d at 392. In *Hodge v. Jones*, 31 F.3d 157, 169 (4th Cir.), *cert. denied*, 513 U.S. 1018 (1994), Associate Justice Powell, sitting by designation, recognized in his concurrence that " 'mere procedural guidelines' " set forth in a state statute "do not create a constitutionally protected liberty interest." This Court held in *Snowden v. Hughes*, 321 U.S. 1, 11 (1944), that "[m]ere violation of a state statute does not infringe the federal Constitution." Following *Snowden*, the Seventh Circuit held that "[a] state ought to follow its law, but to treat a violation of state law as a violation of the Constitution is to make the federal government the enforcer of state law." *Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989).

> The Supreme Court, however, has repeatedly admonished both that the requirements of procedural due process are flexible, and that considerable deference must be accorded the delicate judgments made by responsible state officials. Perhaps in no context is this truer than where the state is acting as *parens patriae* to protect children from imminent danger. "This area has been left to the States from time immemorial, and not without good reason." In this area especially, while of course clear constitutional requirements cannot be ignored, "substantial weight must be given to the good-faith judgments of the individuals [administering a program] . . . that the procedures they have provided assure fair consideration of the . . . claims of individuals."

Jordan, 15 F.3d at 348-49 (quoting *Santosky v. Kramer*, 455 U.S. 745, 771 (1982)) (citations omitted).[7]

Petitioners claim of a property interest in an adequate investigation and protective services in accordance with the Child Protection Act does not state a valid procedural due process claim, but rather, attempts to assert a substantive due process claim of protection by the state. Procedural due process guarantees that a person will not be deprived of a liberty or a property interest without a hearing to vindicate that right. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Yet, petitioners do not demand a hearing or other process to vindicate the alleged deprivation of the claimed property interest in an adequate investigation and protective services, thereby proving the true nature of the asserted due process right.

In *Jensen v. Conrad*, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985), appellants argued that qualified immunity did not protect the DSS workers because the Child Protection Act clearly established an affirmative duty of protection. Following this Court's precedent, the Fourth Circuit held:

> The law in this instance that must be "clearly established" to avert the application of *Harlow* is a constitutional right to protection by the State. A state statute, by itself, cannot create a substantive constitutional right.

Id. at 195 n.12 (citing *Maine v. Thiboutot*, 448 U.S. 1 (1980)). Thus, the Constitution does not guarantee these petitioners the

7. The Fourth Circuit cited the following decisions of this Court: *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *Schall v. Martin*, 467 U.S. 253 (1984); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Morrissey v. Brewer*, 408 U.S. 471 (1972); and *United States v. Yazell*, 382 U.S. 341 (1966).

investigation and protective services outlined in the Child Protection Act.

Petitioners rely upon *Jensen v. Anderson County Department of Social Services*, 403 S.E. 2d 615 (S.C. 1991), in which the administrator of a child's estate filed a wrongful death and survival suit against the Anderson County DSS and several of its employees. The child was beaten to death by his mother's boyfriend, and Jensen alleged that the defendants negligently caused the child's death by failing to investigate a report of child abuse as required by the Child Protection Act. *Id.* at 616-17. The South Carolina Supreme Court held that the Child Protection Act gives rise to a private cause of action and that it imposes a duty on the local agency to investigate and intervene in cases of reported child abuse. *Id.* at 619. Contrary to petitioners' assertion, *Jensen* in no way establishes a procedural due process right to an investigation and appropriate intervention; rather, *Jensen* allows a state claim for violations of the Child Protection Act. *Jensen* recognized a duty to intervene and protect victims of suspected child abuse under state law, and not under the Constitution. To read *Jensen* any differently would render the decision in conflict with this Court's decision in *DeShaney*, which held that the state bears no constitutional duty to protect children from harm inflicted by private actors.

Contrary to petitioners' assertion, this Court in *DeShaney* did not recognize that the protective services set forth in the Wisconsin child protection statutes provided an entitlement which would enjoy due process protection under this Court's decision in *Roth*. *DeShaney*, 489 U.S. at 195 n.2. Instead, this Court was merely reciting the petitioners' position that the protective services set forth in the statute created entitlements under *Roth*, and this Court refused to decide the issue because it was not properly before the Court.

Petitioners later in their brief claim that the Child Protection Act created an entitlement to adequate staffing, delivery of services to victims of suspected child abuse, and general compliance with policies, procedures, and regulations promulgated pursuant to the Act. Petition at 26. "The adoption of such procedural guidelines, without more, suggests that it is these restrictions alone, and not those federal courts might also impose under the Fourteenth Amendment, that the State chose to require." *Hewitt v. Helms*, 459 U.S. 460, 471 (1983). Petitioners quite obviously ask this Court to paint with too broad a brush in defining the existence of constitutional entitlements under state statutory law.

IV.

THE FOURTH CIRCUIT'S DECISION IS BOTH CORRECT AND CONSISTENT WITH ALL CIRCUIT COURTS' ANALYSIS, AND NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE LIST OF QUESTIONS PRESENTED IN THE PETITION.

In what might have been alleged as a negligence case in state court, the custodial parent at the time of the initial child abuse seeks to bring a violation of constitutional rights case in federal court. The case before the Fourth Circuit alleged a multitude of constitutional rights violations in a number of causes of action making claims under the Fourth, Fifth, Eighth[8] and Fourteenth Amendments as well as the South Carolina Tort Claims Act. In the Statement of the Case before this Court, the petitioners still ask that no less than five (5) issues be reviewed and considered to be constitutional rights violations.

8. There is no Eighth Amendment issue presented in this case, despite the petitioners' repeated references to it. Petition at 12, 15, 29. Neither Keena White nor any other White children were ever incarcerated. The Fourth Circuit correctly ignored the Petitioners' attempts to interject this as a basis for constitutional relief on the facts of this case.

These five constitutional due process rights are alleged to be found: (1) in the removal of Keena White from the abusive home of the custodial parent; (2) in the placement of White in the licensed foster home of the Bonners; (3) in the monitoring during the time with the Bonners; (4) in substantive due process rights allegedly created by the South Carolina Child Protection Act; and (5) in substantive due process rights allegedly created by the federal Adoption Assistance and Child Welfare Act.

The Fourth Circuit's opinion carefully analyzed each of these claims. With respect to the due process rights surrounding removal of the children from the abusive home of the petitioner, the court recognized that the South Carolina Code limits the state's authority to assume custody, and the state court afforded proper procedural due process in the notice and hearing. With respect to placement and monitoring in the Bonner foster home, allegations of negligence do not implicate federal constitutional rights. The Fourth Circuit recognized the decisions of other circuits on other facts which crossed the line from negligence to deliberate indifference and found that the petitioners' case "simply fall short on the facts." In dealing with the final two issues, the Fourth Circuit concluded that neither the South Carolina Child Protection Act nor the Adoption Assistance and Child Welfare Act creates new substantive due process rights.

The Fourth Circuit correctly found that within the Fourth Circuit, there is no clearly established right, but the Court went much further. The central thrust of the Fourth Circuit's opinion is the conclusion that on the factual record, there could at best be an attempt to seek compliance with state law or bring a negligence claim, neither of which is properly brought in the federal courts as a constitutional rights case. It is a case for summary judgment on the facts. Under any circuit's standard, there would be no liability here.

The Fourth Circuit is correct that the factual record in this case does not raise a federal constitutional question whatever the clearly established law may be. In this case, on these facts, the Fourth Circuit is not in conflict with any other circuit.

This record does not raise the constitutional issues the petitioners want this Court to review. Rather, it is a factual debate about the correctness of a summary judgment decision on qualified immunity.

CONCLUSION

For the forgoing reasons, the respondents respectfully pray for this Court to deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. First, the Fourth Circuit correctly concluded that no clearly established right to affirmative state protection exists for children in foster care because foster parents are not state actors. Second, the decisions of the other United States Courts of Appeals cited by petitioners would not affect the Fourth Circuit's result in this case, as stated by the court below. Third, the Fourth Circuit correctly applied this Court's precedent in concluding that the AACWA could not form the basis of petitioners' § 1983 claim. Finally, in accord with this Court's prior decisions, the Fourth Circuit correctly decided petitioners' procedural due process claims and correctly held that the Child Protection Act does not create constitutional guarantees.

Respectfully submitted,

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